TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 939

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., PETITIONER,

vs.

WILLIAM H. MISSEL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1942.

CERTIORARI GRANTED FEBRUARY 16, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

[fol. 2]

IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Action No. 901

WILLIAM H. MISSEL, Plaintiff,

vs.

THE OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., a Body Corporate, Defendant

COMPLAINT—Filed October 29, 1940

I

William H. Missel, a resident of the City of Baltimore, State of Maryland, brings this action to recover from the Defendant, The Overnight Motor Transportation Co., Inc., unpaid overtime compensation, in an amount hereinafter set forth and an additional equal amount as liquidated damages, pursuant to Section 16 (B) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Chapter 676, 52 Stat.; U. S. C., Title 29, Section 201 et seq.), hereinafter called the Act.

II

The jurisdiction of this action is conferred upon the Court by Section 41, subsections 1 and 8 of the Judicial Code, Title 28 U. S. C. A., Section 41, subsections 1 and 8 (giving the Federal District Courts jurisdiction of all suits under laws regulating interstate commerce, regardless of the citizenship of the parties or the sum or value in controversy) and Section 16 (B) of the Fair Labor Standards Act of 1938.

III

Defendant is a corporation of the State of Maryland, [fol. 3] and at all times hereinafter mentioned was and now is within the jurisdiction of this Court. Defendant is engaged in the business of motor transportation of freight as a common carrier, operating and carrying on such business from within the State of Maryland into and through

other States, and from and through other States into and through the State of Maryland. The Defendant is licensed and authorized to operate in interstate commerce by the Interstate Commerce Commission and displays on its motor trucks the usual Interstate Commerce Commission's license plates.

IV

Plaintiff was in the employ of Defendant corporation from the time of its incorporation, May 22, 1939, down to and including October 19, 1940; prior to May 22, 1939, Plaintiff was in the employ of Louis Oberfeld and Oscar Oberfeld, trading as Overnight Transportation Company, which company was engaged in a like type of interstate commerce, from and including October 24, 1938, down to and including May 22, 1939. Plaintiff understands and believes, and therefore avers, that the Overnight Transportation Company, Inc., when incorporated took over the assets and liabilites of Louis Oberfeld and Oscar Oberfeld, trading as the Overnight Transportation Company. Plaintiff's employment, therefore, has been continuous with the said Motor Transportation Company from October 24, 1938, down to and including October 19, 1940.

From and including October 24, 1938, to October 19, 1940, inclusive, Plaintiff was employed as a clerk by the Defendant, his particular duty being to classify the business offered to and handled by the Defendant under the applicable schedules of rates. All of the duties performed by Plaintiff for the Defendant were, "in commerce".

V

(A) During the period October 24, 1938, to October 23, 1939, inclusive (for which period the Act establishes a [fol. 4] maximum workweek of 44 hours for an employee, unless such employee receives compensation for his employment in excess of the said 44 hours each workweek, at a rate not less than one and one-half times the regular rate at which he is employed), Plaintiff worked divers workweeks longer than 44 hours and for such hours so worked in excess of the 44 hour workweek, he was not paid by Defendant at the rate of one and one-half times the regular rate at which he was so employed.

(B) During the period October 24, 1939, to October 23, 1940, the Act establishes a maximum workweek of 42 hours

for an employee, unless such employee receives compensation for his employment in excess of the said 42 hours each workweek at a rate not less than one and one-half times the regular rate at which he is employed. During the period October 24, 1939, to October 19, 1940, inclusive, Plaintiff worked divers workweeks longer than 42 hours and for such hours so worked in excess of the 42 hour workweek he was not paid by the Defendant at the rate of one and one-half times the regular rate at which he was so employed.

(C) Plaintiff sets out in Exhibit "A", attached hereto and made a part hereof, such partial record as he has in his possession of hours worked by him, in workweeks in the periods set forth in paragraphs (A) and (B) next above, in excess of the legal maxima, together with his regular rate of pay and amount of unpaid compensation due him for such workweeks; but such unpaid compensation Plaintiff claims is only a portion of what is due him and the exact amount may only be ascertained and discovered from Defendant's records, to which Plaintiff does not have access, which records (as required by Section 11 (C) of the Act) should disclose the complete details of Plaintiff's employment by Defendant, including the type of work, location of work, number of hours worked in each workweek, hours [fol. 5] worked in excess of the statutory number for each workweek, and compensation earned for hours worked in excess of the statutory number for each workweek.

VI

Wherefore Plaintiff demands:

1. That judgment be awarded him, William H. Missel, in the amount found to be due him by this Honorable Court, for unpaid overtime compensation and for an additional equal amount as liquidated damages as provided by the Act.

2. That judgment be awarded the Plaintiff, William H. Missel, in this action for a reasonable attorneys' fee to be paid by the Defendant to Plaintiff's counsel, as provided by the Act.

3. That judgment be given by the Court to the Plaintiff against the Defendant for the costs of this action, as provided by the Act.

4. That the Court may grant to the Plaintiff such other and further relief as the court may deem proper.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

[fol. 6] EXHIBIT "A" TO COMPLAINT

[Title omitted]

Work Week Ending	Hours Worked	Excess Hours Over 44	Average regular rate of pay per hour	Overtime compensation due
9-15-39	77	33	.56818	
9-29-39	79	35	"	
10- 6-39	80	36	"	
10-13-39	73	29	"	
10-20-39	76	32	"	
Total Excess Hours...		165	.56818	165 hrs. @ .85227 $140.62
		Excess Hours Over 42		
10-27-39	80	38	.595238	
11-24-39	62	20	"	
12- 1-39	60	18	"	
12- 8-39	63	21	"	
12-15-39	72	28	"	
12-22-39	60	18	"	
12-29-39	60	18	"	
1- 4-40	77	35	"	
1-12-40	67	25	"	
1-26-40	79	37	"	
2- 2-40	69	27	"	
2- 9-40	54	12	"	
2-23-40	61	19	"	
3-22-40	61	19	"	
3-29-40	53	11	"	
4- 5-40	62	20	"	
[fol. 7]				
4-12-40	50	8	.595238	
4-26-40	65	23	"	
5- 3-40	69	27	"	
5-10-40	62	20	"	
5-17-40	64	22	"	
5-24-40	52	10	"	
5-31-40	64	22	"	
6- 7-40	62	20	"	
6-14-40	44	2	"	
Total Excess Hours...		520	.595238	520 hrs. @ .89285 $464.28

Plaintiff was not paid any compensation for excess hours worked. This exhibit sets out the unpaid overtime compensation due him at the rate of one and one-half times the regular rate at which he was employed. The regular rate

of employment is ascertained by dividing the weekly compensation by the statutory maximum workweek hours for the respective periods.

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed November 19, 1940

The Defendant, by John R. Norris, its Attorney, moves the Court to dismiss the Bill of Complaint because it fails to state a claim against the Defendant upon which relief can be granted.

John R. Norris, Attorney for Defendant.

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil No. 901

WILLIAM H. MISSEL, Plaintiff,

vs.

THE OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., a Body Corporate, Defendant

OPINION OF THE COURT ON MOTION TO DISMISS—Filed February 20, 1941

COLEMAN, District Judge:

This case, which arises under the Fair Labor Standards Act of 1938 (29 U. S. C. A. Secs. 201-219), and involves also the Motor Carrier Act, 1935, (49 U. S. C. A. Secs. 301-327), is before the court on a motion of the defendant to dismiss the bill of complaint on the ground that it fails to state a claim against the defendant upon which relief can be granted.

The bill of complaint discloses that the defendant is a common carrier of freight in interstate commerce by motor vehicle, and that plaintiff was employed by the defendant or its predecessor (whose assets and liabilities the defendant assumed) as a rate clerk from October 24th, 1938, to

October 19th, 1940, and that during this period he worked certain hours in excess of the maximum work-week stipulated by the Fair Labor Standards Act of 1938, and that for such overtime, defendant did not pay him at the rate of one and a half times the regular rate at which he was employed, as required by this Act. Accordingly, the plaintiff brought suit under Section 16 (b) of this Act (29 U. S. C. A. Sec. 216 (b)), and has asked for the relief provided in that section, which reads as follows: "Any employer who violates the provisions of section 206 or section 207 of this chapter shall be liable to the employee or employees affected [fol. 10] in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

It is clear that this court is one "of competent jurisdiction" to entertain the present suit by virtue of Section 24, Paragraph 8 of the Judicial Code (28 U. S. C. A. Sec. 41 (8)) which gives to the district courts original jurisdiction "Of all suits and proceedings arising under any law regulating commerce." The basis for the legislation enacted in the Fair Labor Standards Act is the power of Congress to regulate interstate commerce. The defendant is subject to the provisions of the Motor Carrier Act, 1935 (49 U. S. C. A. Sec. 301-327), as amended by the Transportation Act of 1940, Sections 15 to 27, inclusive, approved September 18th, 1940. It thus follows that this court has jurisdiction regardless of the amount in controversy or the citizenship of the parties.

The basis of defendant's motion to dismiss the bill of complaint is Section 13 (b) (1) of the Fair Labor Standards Act of 1938 which provides as follows, (29 U. S. C. A. Sec. 213 (b)): "The provisions of section 207 (fixing maximum hours of work) shall not apply with respect to (1) any employee with respect to whom the Interstate Com-

merce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; * * *." 49 U. S. C. A. Sec. 304 (a) (1) and (2) provides as follows: "Powers and duties generally. It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and [fol. 11] reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

In interpreting these two inter-related statutory provisions, the Supreme Court, in United States v. American Trucking Associations, Inc., 310 U. S. 534, has declared that the power of the Interstate Commerce Commission under section 204 (a) (1) and (2) of the Motor Carrier Act, 1935, above quoted, to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of motor carriers, is "limited to those employees whose activities affect the safety of operation". The Supreme Court did not, however, in this decision attempt to be more specific, or to name precisely what employees fall within this definition. Defendant contends that since the Commission, up to the present time, has issued no regulations with respect to employees falling under the Motor Carrier Act except drivers of motor vehicles, the district courts are without jurisdiction to entertain a suit of this kind; that is to say, that whether a particular employee falls within the excepted class, namely, is one "whose activities affect the safety of operation" is a question of fact which must first be determined by the Commission, and that until such determination is made, it must be assumed that the plaintiff's hours of work are subject exclusively to the jurisdiction of the Commission and, therefore, fall within the exception of the Fair Labor Standards Act, above

quoted. Defendant asserts that if this court fails to place the plaintiff in the class exempted from the operation of the Fair Labor Standards Act, and holds that he is entitled to back pay for overtime in accordance with the requirements of that Act, motor carriers throughout the country will be subjected to unexpected and unwarranted payroll expenses, directly contrary to the underlying purpose of the Motor Carrier Act. Defendant invokes the doctrine laid down in [fol. 12] Texas & Pacific Rwy. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, to the effect that before a court may pass upon the reasonableness of interstate rates established by a carrier, there must first be a ruling by the Commission as to their reasonableness.

With this contention of the defendant we cannot agree. We do not consider that the principle laid down in the Abilene case, supra, is applicable to the situation before us. It is true that the precise question here presented was not adjudicated in United States v. American Trucking Associations, Inc., supra. There, the only question presented and decided was as to the power of the Interstate Commerce Commission under the Motor Carrier Act, 1935, to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of motor carriers, other than employees "whose activities affect the safety of operation." The suit was originally brought against the United States and the Commission by the Trucking Associations and certain motor carriers. Shortly after the passage of the Motor Carrier Act in 1935, the Interstate Commerce Commission, on its own motion, proceeded to fix maximum hours of service for "employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations." Ex parte No. MC-2, 3 M. C. C. 665, 667. Shortly thereafter the Fair Labor Standards Act of 1938 was enacted containing the provisions above quoted exempting from its terms "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" pursuant to the provisions of the Motor Carrier Act. Since this exemption directly raised the question as to the extent of the Commission's power or coverage of employees under the Motor Carrier Act, the Commission again examined the scope of its jurisdiction and in Ex parte MC-28, 13 M. C. C. 481, 489 again reached the conclusion that its powers under "section 204 (a) (1) and (2) is limited

to prescribing qualifications and maximum hours of service for those employees * * * whose activities affect the safety of operation." The Wage and Hour Division of the Department of Labor arrived at the same result. Interpretative Bulletin No. 9, Wage & Hour Manual (1940) 168.

Thereupon the American Trucking Associations and [fol. 13]. others petitioned the Commission to disregard its report and order in Ex parte MC-28, but the Commission reaffirmed its original position, whereupon a three judge district court was petitioned to require the Commission to take jurisdiction and consider the establishment of qualifications and hours of service of all employees of common and contract carriers by motor vehicle. This court reversed the Commission, set aside its order and directed it to take jurisdiction of the appellees' petition. 31 F. Supp. 35. From this action of the lower court a direct appeal to the Supreme Court was granted, resulting in the opinion already summarized. The supreme Court was divided, five to four, in this decision. The lower court had also been divided.

Although an explanation has already been given of what led up to the decision of the Supreme Court in the American Trucking Associations, Inc. case, supra, it is appropriate to give the following complete chronology of events to the present time: (1) December 29, 1937, report and order of Interstate Commerce Commission in Ex parte No. MC-2, prescribing maximum hours of service for drivers only, of common and contract carriers by motor vehicle, 3 M. C. C. 665. (2) June 25, 1938, Fair Labor Standards Act of 1938 passed, 29 U. S. C. A. 201-219. (3) March 25, 1939, the Wage and Hour Division, Department of Labor, issued Interpretative Bulletin #9 ruling that all employees of common and contract carriers by motor vehicle other than drivers, are subject to the Fair Labor Standards Act with respect to hours, unless and until an order of the Commission determines to the contrary, Wage and Hour Manual (1940) 168. (4) May 1, 1939, the Interstate Commerce Commission ruled in Ex parte MC-28 that it was without power to prescribe qualifications and maximum hours of service for any employees of common and contract carriers by motor vehicle other than those whose activities affect the safety of operation, 13 M. C. C. 48. (5) May 16, 1939, the Interstate Commerce Commission in its ruling No. 79 confirmed the ruling of the Wage and Hour Division in its Interpretative Bulletin No. 9 of March 25, 1939. (6) May 1,

1940, the Interstate Commerce Commission in Ex parte MC-3 ruled that the same regulations prescribed by it for drivers of common and contract carriers by motor vehicle in Ex parte MC-2, shall apply to drivers employed by private carriers by motor vehicle. (7) May 27, 1940, deci-[fol. 14] sion of the Supreme Court in the American Trucking Associations Inc., supra. (8) June 15, 1940, the Interstate Commerce Commission ordered a reopening, upon the request of the motor carrier industry, of Ex parte MC-2 and MC-3 in the light of the Supreme Court's decision. As yet no further order of the Commission has been passed.

At the outset it is to be noted (1) that the exemption clause in Section 13 (b) (1) of the Fair Labor Standards Act embraces only those employees with respect to whom the Interstate Commerce Commission *"has power"* to establish requirements as to qualifications and maximum hours of service; and (2) the Supreme Court has limited such *"power"* to those employees "whose activities affect the safety of operation." It will thus be seen that the basic question upon which a correct decision of the controversy in the present case hinges, is a question quite unlike that presented in the Abilene Cotton Oil Co. case, supra, where the "power" of the Interstate Commerce Commission was conceded, namely, the power to determine the reasonableness of rates. In that case, it was held that when a power is thus given by statute and also the means of executing it are provided, such power can be executed in no other way than that prescribed by the statute. As was said in a later case, Great Northern Rwy. Co. v. Merchants Elevator Co., 259 U. S. 285, 291: "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is

essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission."

It is true, as was said recently in Armour & Company v. [fol. 15] Alton R. R. Co., 111 Fed. (2d) 913, 918 "The Abilene doctrine, the doctrine of primary jurisdiction, is still more easily stated than applied." But the question now before this court is on principle essentially as much a question of law as was the question decided by the Supreme Court in the American Trucking Associations, Inc., supra. There the question was "what power had Congress granted the Interstate Commerce Commission by Section 204 (a) of the Motor Carrier Act"? The court held (pages 546, 547) that Congress had granted no more "than the customary power to secure safety in view of the absence in the legislative history of the Act of any discussion of the desirability of giving the Commission broad and unusual power over all employees." The court explained that the settled policy of Congress had been consistent in its limitation to legislation with respect to regulation of transportation employees in matters of movement and safety only. It said (pages 545, 547, 549): "The Hours of Service Act imposes restrictions on the hours of labor of employees 'actually engaged in or connected with the movement of any train.' The Seamen's Act limits employee regulations under it to members of ships' crews. The Civil Aeronautics Authority has authority over hours of service of employees 'in the interest of safety.' It is stated by appellants in their brief with detailed citations, and the statement is uncontradicted, that at the time of the passage of the Motor Vehicle Act 'forty states had regulatory measures relating to the hours of service of employees' and every one 'applied exclusively to drivers or helpers on the vehicles.' * * * The committee reports and the debates contain no indication that a regulation of the qualifications and hours of service of all employees was contemplated; in fact the evidence points the other way.

* * * * * * *

"The Commission and the Wage and Hour Division, as we have said, have both interpreted section 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight."

The aforegoing being true, it is erroneous to say that, in a suit of this kind, the courts may not determine in advance of a ruling by the Interstate Commerce Commission whether a certain type of employee does or does not fall within the [fol. 16] limits of the classification fixed by the Supreme Court. It is to be noted that the exemption is limited to those employees whose "activities affect the safety of *operation.*" The Supreme Court in American Trucking Associations, Inc., thus concluded its opinion, page 553: "Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in section 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any others." The Commission had declined, for want of jurisdiction as it believed, to determine the qualifications and maximum hours of service for any other class of employees. In this position it was upheld by the Supreme Court. In so doing the Supreme Court has definitely indicated who is an employee "whose activities affect the safety of operation." It is said in effect that to meet this definition his activities must relate to the operation or movement of the means of transportation involved. We do not mean to say that the limitations imposed by the Supreme Court necessarily exclude all but drivers or helpers on motor vehicles merely because at the time of the Supreme Court's decision there was no precedent for enlarging the class. But we do say that there is nothing in the Supreme Court's decision that is in the least indicative of the existence of power in the Commission to say that an employee's "activities affect the safety of operation" when such activities as those of the plaintiff in the present case have only a most remote relation to the actual *movement* of motor vehicles falling under the jurisdiction of the Act. Plaintiff is a rate clerk. His duties are clerical and have no direct relation to operation, other than through the tenuous argument that since motor vehicles cannot lawfully transport goods in interstate commerce until the rates or charges for so doing have been duly established and exacted, the rate clerk, therefore, performs duties relating to operation, because there can be no operation without rates. By the same argument, almost anyone employed by a motor carrier could be said to be engaged in activities related to operation,—one who types or signs a letter relating to safety

measures, or prepares or signs an accident report; even the messenger boy to whom such papers are entrusted, or indeed even the janitor or scrub woman, because these make it possible for others to occupy their offices satis- [fol. 17] factorily and to write and transmit letters or reports.

In addition to the reasons just mentioned, there is something else which is at least very persuasive. It is this: As already shown, after the Wage and Hour Division of the Department of Labor, on March 25th, 1939, ruled that all employees of common and contract carriers by motor vehicle, other than drivers, would be subject to the Fair Labor Standards Act with respect to hours, unless and until an order of the Commission determined to the contrary, the Commission itself formally confirmed this ruling on May 16th, 1939, (Ruling No. 79). Such action is entitled to great weight. It indicates that the Commission must at least have entertained some doubt as to its power to include, within its ruling, even loaders and helpers. A fortiori, this weakens any argument based upon the assumption that the Commission has power, though unexercised, over employees completely removed from the functions of operation.

The conclusion here reached is in no sense weakened by the fact, already noted, that the Commission has reopened and still has under advisement, the question as to whether *any* employees other than drivers of motor vehicles should be declared to be subject to the Commission's regulations. It may well be that the Commission may decide that certain other types of employees, such as loaders or even helpers if engaged in operative functions, should be brought under its jurisdiction, and such would be an exercise of granted power. In the Abilene and like decisions, the question was not, as here, whether *power* existed in the Commission. Such was conceded. The question there was as to the *exercise* of the power. Suppose the Commission should ultimately decide that the activities of rate clerks and of all other clerical workers employed by motor carriers subject to the Act do affect the safety of operation. We must assume that such would be contrary to the Supreme Court's ruling, because, as we conclude, the Commission has no *power* as a result of what the Supreme Court has decided, to establish regulations with respect to such persons. To be sure, after the Commission has fixed a rate

or classification pursuant to the Abilene doctrine, courts may strike it down as unreasonable or discriminatory. But in such case, the primary jurisdiction,—the *power*,—to fix *some* rate or classification would be conceded; whereas in [fol. 18] the other case supposed, jurisdiction would have been asserted with respect to persons over whom there never was any *power*. In the one case, it would be abuse of granted power; in the other, exercise of power never, in fact, granted at all.

Finally, we are not unmindful of the fact that our present ruling may have the result of imposing unexpected additional expense upon motor carriers, and also, that since courts have power to determine when "safety of operation" is, in fact, affected, there may be a variation from time to time in the different decisions upon this point.

Indeed the lower court in its opinion, and the minority Justices of the Supreme Court by their adoption of the reasons in that opinion, in the American Trucking Associations case, supra, were firmly of the view that stabilization of labor conditions as applied to the motor carrier industry was necessary, and that it was not unreasonable to assume that Congress, aware of the problem and of the need for uniformity, chose to place upon the Commission full power to solve the problem. But a majority of the Supreme Court has decided otherwise, and once it be clear as we are satisfied it is, that a determination of whether the *power* is actually possessed by the Commission, is essentially a judicial function, the present plaintiff, and others in a like situation, are entitled to have their status under these statutes promptly and definitely determined. Under defendant's theory, the power of the courts to do this may be indefinitely suspended, which means a suspension of the operation of both statutes with respect to such rights as employees, like the plaintiff, may have under them.

If it be said that the plaintiff should first petition the Commission and obtain its ruling, as the association of truckmen and various common carriers did in the proceedings which led up to the decision of the Supreme Court in the American Trucking Associations case, supra, suffice it to point out that the plaintiff's position is opposite to that of those petitioners. He does not want the Commission to do anything. His suit is not brought under the Motor Carrier Act, but under the Fair Labor Standards Act. Both of these statutes have been upheld by the Supreme Court.

See Maurer v. Hamilton, 309 U. S. 598; Darby Lumber Co. v. United States, and Opp Cotton Mills v. Administrator of Wage, etc., decided February 3rd, 1941. In the case first mentioned, the Commission had made no regulation con-
[fol. 19] cerning sizes and weights of motor vehicles or their loads. Nevertheless, the Supreme Court, in a suit which originated in a State Court to enjoin the enforcement of a State statute, held that the Commission had no regulatory power in this particular field, under Section 204 of the Motor Carrier Act which we have been considering. The analogy is clear and supports the conclusion we have reached in the present case.

For the reasons given, defendant's motion to dismiss the bill of complaint must be overruled.

William C. Coleman.

[fol. 20] In United States District Court

[Title omitted]

Answer—Filed March 17, 1941

The Answer of Overnight Motor Transportation Company, Inc., by John R. Norris and J. Ninian Beall, its attorneys, to the Bill of Complaint filed against it in the above proceedings, respectfully represents that:

I

It admits the allegations contained in Section I but denies that Plaintiff is entitled to recover.

II

It admits all of the allegations contained in Sections II and III thereof.

III

It admits the allegations contained in Section IV except insofar as Plaintiff asserts that he was employed as a clerk by the Defendant, his particular duty being to classify the business offered to and handled by the Defendant under the applicable schedules of rates, which assertion Defendant denies.

IV

It denies all of the allegations contained in Sections V (A), V (B) and V (C) thereof; and also the contents of Exhibit A referred to in Section V (C) and appended to the said Bill of Complaint.

[fol. 21] V

It denies that the Bill of Complaint states a claim against the Defendant upon which relief can be granted.

Wherefore, having fully answered said Bill of Complaint, Defendant prays that the same be dismissed with its proper costs.

John O. Norris, Fidelity Bldg., Baltimore, Md. J. Ninian Beall, 1013 16th St., N. W., Washington, D. C.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF AMERICAN TRUCKING ASSOCIATIONS, INC., TO INTERVENE AS "AMICUS CURIAE" AND ORDER OF COURT GRANTING MOTION—Filed April 22, 1941

American Trucking Associations, Inc., moves for leave to intervene as Amicus Curiae in this action, in order to assert the defenses to be set forth in a brief to be filed with this Honorable Court prior to the trial of said cause, the ground for said intervention being that the American Trucking Associations, Inc., is the national trade association of the trucking industry the members of which are vitally affected by the issues involved in said cause in which the decision will establish an important precedent.

And Whereas, it is the duty of the applicant for intervention to protect the interests of its members in litigation matters of national importance in which precedents may be established, and said Association has heretofore been the active party in all prior proceedings before the Congressional Committees, Interstate Commerce Commission, United States District Court (31 Federal Supplement 35) and United States Supreme Court (310 U. S. 534; rehearing denied 61 S. Ct. 53).

Now, Therefore, comes the applicant for intervention and prays this Honorable Court to grant its motion for leave to intervene as "Amicus Curiae" to present both questions of law and of fact which are common to the main action.

J. Ninian Beall, Attorney for American Trucking Associations, Inc., 1424—16th St. N. W. Washington, D. C. John R. Norris, 1513 Fidelity Building, Baltimore, Md.

[fol. 23] ORDER

Whereas it appears that the American Trucking Associations, Inc., is a party having a common interest in the proceedings in the case of William H. Missel vs. The Overnight Motor Transportation Company, Inc., a body corporate, Civil Action No. 901.

And Whereas said American Trucking Associations, Inc., desires to intervene as "amicus curiae" in said case.

It is Ordered this 22nd day of April, 1941, by the U. S. District Court for the District of Maryland that, said American Trucking Associations, Inc., is hereby given leave to intervene as "Amicus Curiae" in this action.

William C. Coleman, U. S. District Judge.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATIONS OF FACTS—Filed April 22, 1941

1. All duties performed by Plaintiff for Defendant were "in commerce".

2. Both parties admit jurisdiction of the Court over themselves and the subject matter.

3. Both parties admit that Defendant is licensed to engage in and does operate in interstate commerce.

4. William H. Missel, Plaintiff, employed by Overnight Motor Transportation Company, Inc., Defendant, performed duties of the following nature:

(a) Applied proper rates to various classifications of freight.

(b) Received collections of freight revenue from drivers and accounted for same to company auditor.

(c) Disbursed from company funds to employees, includ-

ing drivers, for road men's travel advance; also, disbursed therefrom miscellaneous amounts on approved vouchers.

(d) In absence of chief dispatcher would dispatch trucks.

(e) None of the duties performed by Plaintiff were those of a driver, driver's-helper, loader, or mechanic as defined by the Interstate Commerce Commission in its decision of March 4, 1941 in Ex Parte MC-2 and MC-3.

[fol. 25] 5. That Plaintiff commenced to work for Defendant on November 26, 1937 at a salary of $23.00 per week, plus supper money of $2.50 per week, or a total of $25.50 per week; and on November 1, 1938 his salary was increased to $25.00 per week, plus supper money of $2.50 per week, or a total of $27.50 per week; that he worked a varying number of hours per work-week from the time of commencement of employment until termination on October 19, 1940; that the work-week ended on Thursday.

6. That Plaintiff was paid his weekly salary regardless of absent time.

7. *Longest Number of Hours In Any One Work-Week.* That in at least each of two of the said work-weeks during the period October 24, 1938-October 23, 1939, Plaintiff was on duty a maximum total of 80 hours; that in at least each of three of the said work-weeks during the period October 23, 1939-October 19, 1940, Plaintiff was on duty a maximum total of 75 hours.

John R. Norris, Clayton W. Daneker, Attorneys for Plaintiff. J. Ninian Beall, William O. Tydings, George A. Mahone, Attorneys for Defendant, Per W. L. Ritchey.

[fol. 26] In United States District Court

[Title omitted]

Plaintiff's Motion for Leave to Amend Bill of Complaint and Order of Court Granting Motion—Filed April 24, 1941

Comes now the Plaintiff, by his Attorneys, and respectfully moves for Permission of the Court to Amend the Bill of Complaint, heretofore filed in this cause, by supplementing said Bill of Complaint to show an alternative method of determining the "regular rate at which he is employed" (or was employed), (Section 7 (a) (3) Fair Labor Stand-

ards Act of 1938), and to show by reason of such alternative method an alternative claim or claims for unpaid overtime compensation, to wit:

By adding a paragraph to follow V (C) on page four of the Bill of Complaint, to be shown as (D) and reading,

(D) Or in the alternative, if the regular rate at which he was so employed should be held Not to be a rate arrived at by dividing his weekly salary by the maximum number of hours in the respective statutory workweeks, then and in that event Plaintiff claims the regular rate at which he was so employed should be determined by dividing his weekly salary by the number of hours found by the Court to have been worked per workweek by Plaintiff; and, therefore, under this alternative claim the total amount due Plaintiff for unpaid overtime compensation will be a matter of computation based upon the findings of the Court.

[fol. 27] Wherefore, your Petitioner prays that an Order may be passed authorizing the aforegoing Amendments to the Bill of Complaint.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

ORDER

Ordered, this 24th day of April, 1941, by the District Court of the United States, for the District of Maryland, that leave be and it is hereby granted Petitioner to amend the Bill as prayed, and that the Bill stands as amended by the additions thereto set out in the aforegoing petition inserted at the paragraph specified therein.

William C. Coleman, United States District Judge.

[fol. 28] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[Title omitted]

EXTRACT OF PROCEEDINGS BEFORE THE COURT ON APRIL 24, 1941

Baltimore, Maryland, April 24, 1941.

Before His Honor Judge William C. Coleman

APPEARANCES:

Messrs. George A. Mahone and William O. Tydings, appearing on behalf of plaintiff.

Messrs. John R. Norris, J. Ninian Beall and Clayton W. Daneker, appearing on behalf of defendant.

(Extract from discussion)

The Court: Let us see if I get the figures right, because I have not carried them in my mind from the pre-trial conference. This plaintiff was employed at a weekly rate of $27.50 a week; is that correct?

Mr. Mahone: For a short period after the Act went into effect he was employed at $23 per week, as the stipulations show, plus supper money of $2.50 a week which counsel on the other side regard as part of his salary, I understand. I don't know whether they do or not. Then on November 1, 1938, he got a salary of $25 a week plus supper money of $2.50 a week.

The Court: That is what he was getting when the Act went into effect?

Mr. Mahone: He was getting $23. The Act went into effect October 24, 1938.

The Court: There ought not to be any dispute now as to what he is getting.

[fol. 29] Mr. Mahone: There is no dispute as to what his salary was. It was stipulated in order to eliminate the necessity of making any proof on it. The only thing to determine here by the Court, as I see it, is what was his rate of pay?

The Court: I want to know what his regular rate of pay was under his contract. Is not that stipulated?

Mr. Mahone: His regular rate of pay was $25 a week.

The Court: You said $23 a moment ago.

Mr. Mahone: I did. He was employed to come to work at $23 a week and he accepted it. That was the contract. That was for 1937, November. Then the Act went into effect October 24, 1938. On November 1, 1938, the weekly salary was increased to $25 per week.

The Court: Are we concerned here with $25 or $23?

Mr. Mahone: I would say with the $25.

The Court: In addition to that he got $2.50?

Mr. Mahone: Yes.

The Court: During the period that is involved?

Mr. Mahone: That was for supper money and not for compensation, it was not his salary.

Mr. Mahone: The Plaintiff's rate of pay is to be determined by the number of hours worked divided into his wages or salary, as the case may be. I want to develop the fact it would be necessary here to put the plaintiff on the stand in the absence of any complete record by the defendant. I think they will admit they have no record except from June, 1940.

Mr. Norris: June 14, 1940.

Mr. Mahone: That is when they first began to keep records. The plaintiff has some time cards which he [fol. 30] punched himself, very fragmentary. He states they are only part, but the only record he has.

The Court: I thought the pre-trial conference and stipulation did away with any testimony about what the man was getting.

Mr. Mahone: We agree he was getting $25 a week, but we do not agree the court's method of determining the rate of pay is correct, basing it on the minimum.

The Court: That is a legal question.

As I understand this case, the object of the plaintiff now —I don't recall the exact figures, but the object of the plaintiff is to require the defendant to pay him about twice the salary that they contracted to pay him as the result of this Act. That is the sum and substance of it as developed in the pre-trial conference. He was getting some $1200 a year.

Mr. Mahone: I have forgotten the exact amount.

Mr. Norris: $1,420.

The Court: And the effort is now to prove that he is entitled to, I think, over twice that amount?

Mr. Norris: $3,500 additional account of the double penalty claim that has been made.

Mr. Mahone: It is around $1,700.

The Court: I am still not satisfied that you have shown me that any further testimony should be taken. . . . Is there any dispute as to what he did get?

Mr. Mahone: There is no dispute he got $25 a week. But your Honor is not going to foreclose the plaintiff here showing that under the Act he was not paid what he was entitled to. He was entitled to more than $25 a week.

The Court: That is not a matter for the plaintiff to say on the witness stand. That is a question of computation from the language of the Act.

[fol. 31] Mr. Mahone: Precisely. But unless you put the witness on the stand you have no average number of hours. In the exhibit there are, I think, thirty weeks he was able to keep a record, and if you add the hours and average it at 30, it shows an average of 65 hours a week.

The Court: Mr. Norris, what is your attitude?

Mr. Norris: It was my understanding that at the pre-trial conference the stipulation of fact that has been filed in the case covered every issue; that in your Honor's opinion the law was a minimum wage act, and that there was no problem of averaging hours or of determining a rate for the particular week within which the plaintiff worked, because in the most extreme case where the plaintiff did 80 hours of work in one week taking the statutory rate of pay which your Honor determined was the proper method, that still only gives an earning for that week under the minimum wage law of $24.50, and he was paid $25. Therefore, under the minimum wage act it has been satisfied.

It is very clear that in the first year of the Act the plaintiff worked two weeks in which he was on duty a great number of hours, eighty hours. And in the second year of the Act there were three weeks in which he spent as much as 75 hours a week. There was obviously no week in which he spent more than 80 hours or 75 hours respectively on duty in any of that period. Even in the week where he did work 80 hours and the Minimum Wage Act requires he be paid 25 cents an hour for the first 44 hours and 32½ cents an hour for the remaining 36 hours, an arithmetical calculation shows a total sum of $24.50 which he should receive, and he received $25 for that week plus supper money of $2.50.

. . . . . .

The Court: Now, let us suppose—I am not asking you to accept it as true, but just as a test—suppose it could [fol. 32] be shown that the plaintiff worked on an average, we will say, to make it shorter, during both the first and second year period, worked on an average 65 hours.

Mr. Norris: Just looking at the Bill of Complaint will show how difficult it is for any one to testify as to the average.

The Court: I understand that. But let us take that as a typical case, and take it for the first year, 65 hours and

subtract 44 from it; that would be an excess of 21 hours, would it not?

Mr. Norris: Yes, sir.

The Court: Now worked out on the other theory what would it be, on the liberal theory, 1½ times the regular rate at which he is employed?

Mr. Mahone: On our theory that would make 42 cents an hour—65 into $27.50.

The Court: Gives you 42?

Mr. Mahone: Yes, sir, 42 cents as his regular pay per hour.

The Court: Then he would be entitled to 42 times 44.

Mr. Mahone: That is right.

The Court: Which is $18.48.

Mr. Mahone: That is what I make it.

The Court: Then he would be entitled to 21 times——

Mr. Mahone: 63.

The Court: That comes to $13.23.

Mr. Mahone: Correct.

The Court: Which gives you a total of $31.71?

Mr. Mahone: Yes, sir.

The Court: Which would be some four dollars more than he gets.

[fol. 33] Mr. Mahone: On that particular basis.

The Court: That serves to illustrate the point.

Mr. Norris: It is urged in the Bill of Complaint that the plaintiff being employed at $27.50 a week the law automatically says that is for a 44-hour week and therefore for a 44-hour week you get the same salary of $27.50, and perhaps my brother can tell me what that figure is.

Mr. Mahone: It would be very much higher than this figure.

Mr. Norris: It gives us a rate per hour of 63½ cents.

Mr. Mahone: That is for the overtime.

Mr. Norris: That is for the basic 44 hour week and the overtime.

The Court: Let me see if I understand you. Let us take the same supposed average of 65 hours. You subtract 44 from it and we have left 21. The weekly rate is $27.50.

Mr. Norris: Divided by 44.

The Court: We divide that by 44 and that gives us 63 cents per hour. Then we multiply 63 by 44, is that right?

Mr. Norris: 63 by 44 gives you $27.50.

The Court: Then we multiply 63 by 1½ times.

Mr. Norris: Yes, sir.

The Court: And 1½ times 63 would be multiplied by 21.

Mr. Norris: That gives a time and a half rate of 94½ cents an hour, multiplied by 21 overtime hours.

The Court: Yes.

Mr. Norris: That gives $19.74 for the overtime and $27.50 for the straight time.

The Court: Yes.

Mr. Norris: Or, $47.24 a week.

The Court: That method raises it.

Mr. Mahone: Both methods raise it, the one more than the other.

[fol. 34] The Court: Don't those two methods illustrate your point of view?

Mr. Mahone: Yes.

The Court: Then I get back to the query I made before. If I could be sure your client had records which would show the hours for every week, so we could strike an average, then I would permit him to show those items. In fact, it would not be necessary for him to take the stand because counsel could do it in advance. But he has no records.

Mr. Mahone: Only the 30 weeks shown in the exhibit.

The Court: 30 weeks out of how many weeks that he worked?

Mr. Mahone: 103 or 104.

The Court: Then you have not over 30 per cent. What would the average for the 30 weeks be?

Mr. Mahone: It so happens the average for the 30 weeks is 65 hours. Your Honor selected 65. In those 30 weeks there were 1,957 hours, total hours worked, as shown by the exhibit. On the basis of the 30 weeks, I worked it out, and it shows $25 instead of $27.50.

The Court: Does the defendant refuse to accept those records as being accurate for the 30 weeks?

Mr. Norris: I do not see where that is shown to be the average of thirty weeks.

Mr. Mahone: It has not been shown. I added them up and divided.

Mr. Norris: Will you indulge me for just a moment?

The Court: Very well.

Mr. Norris: If your Honor please, that does bear out 100 per cent my brother's contention. We don't know and we are not prepared today to show whether plaintiff has shown here the records which reveal the greatest number

of hours. The records we have in our possession are much [fol. 35] nearer the maximum hours prescribed in the Act. They are not that figure, but much nearer that figure. I have not attempted to go into that because I did not think your Honor was interested in those figures today. But I think there is an argument that this is not an average, this is the high. It appears that when the man worked 80 hours he kept a record; and when he worked less than that he has no record.

The Court: Are you prepared to accept the figures as accurate for 30 weeks? If you are prepared to do that, and I do not see why you should not be, and if they were prepared by him, and he takes the stand and swears that is what he did work, and you have not got anything to refute that, I suppose that is the best evidence. If you are prepared to do that, then if the man also is prepared to make a statement that to the best of his knowledge and belief for the remaining weeks he worked so and so on an average, I will let that in the record. But I am not going to permit a whole lot of data to be offered that really is not the best evidence.

Mr. Norris: He has some sort of a record, I understand from his counsel that would substantiate an entry of 80 hours. We would want to know whether that included lunch time and supper time.

The Court: Why bother about 80 hours?

Mr. Norris: We have taken his top figure of 80 and was accepting it as correct for those two weeks. Still, you have no case. We certainly do not agree that on those figures of his without a very involved and lengthy cross-examination there is any accuracy to them for the purpose of establishing an hourly average per week.

The Court: You mean even for the period you stipulate?

Mr. Norris: Our stipulation only goes to the maximum number of hours in the one week.

[fol. 36] The Court: I understand. I am trying to shorten this matter. What is the objection, since neither side has full records, to the defendant admitting the records that we have of the plaintiff, if the defendant has not any better ones. And then, secondly, what is the objection to the defendant admitting the statements of the plaintiff that to the best of his knowledge and belief the average for the remaining weeks, 104 less 30, or 74, was, in his opinion, so and so, so many hours.

Mr. Norris: He has listed here 77 hours, and I would like first to see the memorandum that is in his possession. He says for the week ending September 15 he worked that many hours. If he has a memorandum we want to see the memorandum and want to see if the memorandum shows lunch time and supper time, or how does he keep that record. On our own time cards he has failed on some occasions to check in and out.

The Court: If he is put on the stand I will let you ask him how he arrived at those figures, but I am not going to allow you to take up each case. If he states that is the way he did it in every case that ought to be sufficient.

Mr. Norris: The burden of proof is on the plaintiff to establish his case. If he says, "I worked one week 77 hours", we have a right to cross-examine to find out if he is accurate for that week. If he says some other week he has worked 76 hours, we have a right to see the record and to cross-examine him, whether that reflects time off for lunch and supper. The contention of counsel presented this morning was to take the actual number of hours worked in a particular week. We can not find the actual number by an average; and the average for the first year of the Act would not apply to the average for the second year when we have a different rate of pay.

[fol. 37] Mr. Mahone: The word "actual" I do not find in the amended bill of complaint.

Mr. Norris: The second example you made to the Court this morning was to take a $25 salary per week and divide that by the actual hours worked that week.

Mr. Mahone: That was for the purpose of an illustrative calculation. The court stated exactly what we had in mind, to put the witness on the stand and have him testify as to what his recollection was as to the time he worked there for those periods other than that for which he has a record.

The Court: Gentlemen, I reach this conclusion. I will not allow any more testimony in this case, because I think we have sufficient figures both in the stipulation and in the hypothetical example that we can strike an average in order to enable the Court to arrive at a just decision on the law. Then it will be necessary on appeal to determine, if it can be determined, what were the actual hours worked per day, per week, by this plaintiff, and the matter will be referred to a master for the purpose of taking that testimony. Cer-

tainly, I am not going to take the time of this Court now in this hearing in order to get all of this spread on the record when I do not think it is necessary. If it should be necessary to determine it, it is a matter for the master to determine, if it can be determined, or for the parties subsequently to get together, after digging into these records, such as exist, and see if they can not arrive at some average.

Now, I will be very glad to hear argument from counsel.

[fol. 38] In District Court of the United States for the District of Maryland

[Title omitted]

Direction to Enter Judgment—Filed April 24, 1941

To the Clerk:

Enter judgment in the above-entitled case for the Defendant for costs.

William C. Coleman, U. S. District Judge.

Date: 24 April, 1941.

Docket Entry of Judgment

April 24, 1941. Judgment for the Defendant for costs, Order of Court filed.

[fol. 39] In District Court of the United States for the District of Maryland

Civil No. 901

William H. Missel, Plaintiff,

vs.

The Overnight Motor Transportation Company, Inc., a Body Corporate, Defendant

Opinion—Filed July 28, 1941

Coleman, District Judge:

This is a suit brought in reliance upon the Fair Labor Standards Act of 1938 (29 U. S. C. A. Secs. 201 to 219, in-

clusive) by the plaintiff, an employee of the defendant, to recover additional wages or salary alleged to be due him, together with penalties, attorney's fee and costs.

It appears from the stipulation of facts filed in the case that the plaintiff was employed by the defendant, a common carrier of freight in interstate commerce by motor vehicle, as a rate clerk, his duties also embracing at times the receipt and disbursement of cash freight revenue, and the dispatching of defendant's trucks.

The period of employment here involved is approximately two years, from October 24, 1938, to October 19, 1940. Prior to November 1, 1938, plaintiff received a salary of $23.00 a week plus $2.50 per week allowance for supper money, or a total of $25.50; but from the latter date until October 19, 1940, when his employment with the defendant ceased, he received a salary of $25.00 per week plus the $2.50 allowance, or a total of $27.50 per week. It is conceded that the supper money allowance is properly to be treated as part of plaintiff's wages in interpreting his [fol. 40] rights under the Act. (Section 3 (m) 29 U. S. C. A. Sec. 203 (m)). His contract of employment is not evidenced by any writing. The company kept no record of the number of hours that plaintiff worked during the period here involved prior to June 14, 1940, since it had been decided by the District Court for the District of Columbia that employees such as the plaintiff were not subject to the provisions of the Fair Labor Standards Act, (American Trucking Associations v. United States, 31 F. Supp. 35), and the Supreme Court had not yet reversed this decision which it did on May 27, 1940. See United States v. American Trucking Associations, 310 U. S. 531. The plaintiff, however, did keep an account of the hours he worked for thirty weeks (not all consecutive) between September, 1939 and October, 1940, that is, for less than one-third of the total period of plaintiff's employment. This data shows that during this period of thirty weeks, plaintiff worked on an average of sixty-five hours a week. But it also appears that plaintiff was hired to work for no specific number of hours per day or week; that his periods of work varied greatly from day to day; that he regulated his on-duty hours according to his own judgment as to what was necessary; that his work weeks ended on Thursday; that he was paid his weekly salary regardless of absent time; that for at least two work weeks during the

period from October 24, 1938, to October 23, 1939, he was on duty as long as eighty hours, and that in at least three of the weeks during the period from October 23, 1939, until he left the Company, namely, October 19, 1940, he was on duty as much as seventy-five hours.

Since, as above explained, plaintiff has only a partial record of the hours he claims to have worked, he has submitted figures for only a portion of what he claims to be due him amounting to $604.90 but approximates the total at $1700.00. He also claims an additional amount as liquidated damages equal to such unpaid compensation as may [fol. 41] be found to be due him, making the total claimed as salary or wages approximately $3400.00, together with reasonable attorney's fee and costs of the action, relying upon the provisions of section 16 (b) of the Act (29 U. S. C. A. Sec. 216 (b)).

This case was previously before the Court on a motion of the defendant to dismiss the bill of complaint, on the ground that this Court had no jurisdiction to determine, in advance of a ruling by the Interstate Commerce Commission, whether the plaintiff is one whose activities affect the safety of operation of interstate motor vehicles, within the meaning of Sec. 13 (b) (1) of the Fair Labor Standards Act exempting employees with respect to whom the Commission has power to establish requirements concerning qualifications and maximum hours for service. This section is as follows: "The provisions of section 207 (fixing maximum hours of work) shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; * * *." 49 U. S. C. A. Sec. 304 (a) (1) and (2) which is part of the Motor Carrier Act of 1935, provides as follows: "Powers and duties generally. It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preserva- [fol. 42] tion of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

We overruled defendant's motion, since the above quoted exemption in Section 13 (b) (1) of the Fair Labor Standards Act embraces only those employees with respect to whom the Interstate Commerce Commission "has power" to establish requirements as to qualifications and maximum hours of service; since the Supreme Court, in United States v. American Trucking Associations, supra, limited such "power" to those employees "Whose activities affect the safety of operation"; and since plaintiff's activities cannot be said to "affect the safety of operation" because they have only a most remote relation to the actual movement of motor vehicles falling under the jurisdiction of the Interstate Commerce Commission. Missel v. Overnight Motor Transportation Co., 36 F. Sup. 980.

Following our disposition of the motion to dismiss the bill of complaint, the defendant answered and the case is now before us on its merits. American Trucking Associations, Inc. was permitted to intervene as amicus curiae, it being the national trade association of the trucking industry, and the defendant being one of its members.

The pertinent provisions of the Fair Labor Standards Act are the following: Sec. 6 (a) and (b): "(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than [fol. 43] 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 208.

* * * * * * *

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this chapter. * * *." (29 U. S. C. A. Sec. 206 (a) and (b)). Sec. 7 (a): "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. * * *." (29 U. S. C. A. Sec. 207 (a).

It is conceded that at all times during the period of employment here in question both the $25.50 and the $27.50 weekly rate which plaintiff received was greater than the total minimum wages prescribed by the Act for the maximum hours for the work weeks as provided in the Act, plus [fol. 44] one and one-half times such minimum wages for all hours which he worked in excess of such stipulated maximum hours. Nevertheless, plaintiff contends that under the Act the amount of compensation due him by the terms of his employment by the defendant for all overtime must be determined by one and one-half times a rate found by dividing his weekly salary (1) by the number of hours actually worked per week; or (2) by the statutory work week hours. Plaintiff further asserts that since date is lacking with respect to the total number of hours in excess of the statutory maximums actually worked by him during most of the period in question, the Court should strike an average in applying the first of the aforegoing formulae.

In short, while plaintiff had agreed to work, and did work for almost two years after the Act became effective at the annual compensation of $1430. or $2860. for the two year period here in question, he now claims he should be paid retroactively $3400. additional,—in all, considerably more than double his agreed and accepted compensation.

As illustrative of the two methods of computation urged as alternates by the plaintiff, we will take sixty-five hours per week as the assumed average which plaintiff worked throughout the period in question, this being the average for the short period for which there are any records. Deducting from this the statutory maximum of forty-four hours, there is overtime of twenty-one hours. Sixty-five divided into the actual salary paid plaintiff, namely, $27.50, gives an hourly rate of 42½ cents, which, multiplied by forty-four hours, equals $18.70. Then, multiplying the overtime hours, namely, twenty-one, by one and one-half times this rate or 63¾ cents, we get $13.38¾ or a total of $32.08¾, that is to say $4.58¾ in excess of what the [fol. 45] plaintiff actually received. Similarly, to illustrate the second or alternate method urged by plaintiff for computing the amount of compensation due him, namely, dividing his weekly rate by the statutory hour maximum, namely, fourty-four, we obtain an hourly rate of 62½ cents, or 93¾ cents for the overtime rate for twenty-one hours, giving a total for overtime of $19.68¾ which, added to $27.50, gives a total of $47.18¾, or $19.68¾ per week in excess of what plaintiff has actually been paid.

The defendant Company, on the other hand, contends that since plaintiff was employed at a weekly salary to do a job rather than to work on a schedule of hours, because that job necessarily involved irregular, fluctuating periods of work per day, the sole effect of the Fair Labor Standards Act upon employment of this kind is to fix a floor, or minimum wage, below which it is not permissible to contract; that is to say, that an employer must pay the employee not less than 25 cents per work week comprising forty-four hours (taking the rate for the first year that the Act became effective), and not less than one and one-half times this minimum rate of 25 cents per hour for all hours worked in any one work week in excess of forty-four hours, but that the Act does not otherwise reform existing contracts or impair freedom to contract.

For example, defendant asserts that with respect to each of the two work weeks during the period from October 24, 1938, to October 23, 1939, that plaintiff claims he was on duty for eighty hours, for the purpose of determining whether the requirements of the Act have been satisfied, his minimum pay is to be determined by computing the wage for forty-four hours at 25 cents per hour or $11.00, and then by computing the wage for the additional hours, namely, [fol. 46] thirty-six, at 37½ cents per hour (one and one-half times 25 cents) or $13.50, making a total of $24.50, which is less than the weekly salary actually paid at all times during the period here involved.

In United States v. Darby, 312 U. S. 100, the Supreme Court sustained the constitutionality of the Fair Labor Standards Act of 1938, holding, in a suit directly involving the criminal provisions of the Act, that this legislation was within the commerce power and consistent with the Fifth and Tenth Amendments. It held that the wage and hour provisions of the Act do not violate the due process clause of the Fifth Amendment, saying, (page 125): "Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed." However, we find nothing in the decision in the Darby case which can be taken as an adjudication of the precise question now before this Court, which is not one of constitutionality, but of the interpretation and effect upon a contract of employment, such as that between the present plaintiff and defendant, of the provision of Section 7 of the Act prohibiting a longer work week than specified in that section, unless the employee is paid for overtime "at a rate not less than one and one-half times the regular rate at which he is employed." In other words, the question presented for decision here is: At what "regular rate" per hour, if any, within a proper interpretation of the words and meaning of the Act, was plaintiff employed?

It is significant that the Act contains no prohibition against or limitation upon working extra hours, and no prohibition against or limitation upon the making of agreements by employers with employees. It is clear that the underlying purpose of the Act is to establish and gradually [fol. 47] to raise minimum wages; that the overtime provisions in it were not inserted in order to discourage or

limit overtime work, but merely as an essential part of a plan to raise sub-standard wages by providing definite pay for overtime work when such may be required, and that there is nothing in the Act which purports to impair the right of employer and employee to contract in a manner not inconsistent with this basic scheme. As the Supreme Court said in United States v. Darby, supra, (pages 109-110): "The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in section 2 (a) of the Act, and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess. Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with 'Industry Committees', appointed by him."

What, then, is the correct interpretation to be given to [fol. 48] the phrase "regular rate at which he is employed", as used in the proviso of Section 7 (a) of the Act when applied to employment such as that in which the plaintiff was engaged? At first blush, it may be said that these words are not ambiguous; that wherever weekly salaries are paid, no matter how freely and voluntarily agreed to, the "regular rate" referred to in the statute must invariably be determined, as plaintiff here contends, by dividing the actual weekly compensation by either the total number of hours the employee actually works during each work week, or by

the statutory number of hours to which the statutory minimum wage applies for the particular period, and then multiplying the number of overtime hours by one and one-half times the rate obtained by one or the other of these methods. The Supreme Court said in United States v. American Trucking Associations, Inc., supra, (page 543): "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." But, as the Supreme Court went on to say, (pages 543-4): "When that meaning has let to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' The interpretation to the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty [fol. 49] requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. *Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'*" (Italics inserted).

We conclude that to give to the words, "the regular rate at which he is employed", the strictly literal interpretation for which plaintiff contends, would produce an unreasonable result at variance with what we understand to

[fol. 50] be the basic principle of the Fair Labor Standards Act. It is to be noted that there is no suggestion in the present case of any attempt on the part of the employer, the defendant, to evade the requirements of the Act. On the contrary, the facts as stipulated disclose that after the Act became effective, plaintiff's wages were increased, although, as herein before explained, what plaintiff had previously been paid was in excess of the Act's minimum requirements. It is further to be noted that from the very nature of plaintiff's employment it would have been extremely difficult if not practically impossible to make a fair working agreement based on hours of work, in view of the great variation from day to day in the length of time that plaintiff might be required to work. In short, we conclude that the only "regular rate" at which plaintiff was employed was the weekly rate; and that since this rate did not afford less, but more, compensation to plaintiff than that afforded by applying the minimum rate stipulated in the Act to the stipulated maximum hours for a regular work week, and one and one-half times such minimum rate to the maximum overtime hours actually worked by plaintiff as disclosed by such records as are available, the Act has not been violated.

Unfortunately, no help with respect to this precise question is to be derived from the Committee hearings in Congress or from conference reports. Legislation which finally resulted in the passage of this particular Act was pending before Congress for two years or more. The House and the Senate each passed radically different bills. Conferees were appointed and according to the usual procedure, their efforts ultimately resulted in the drafting and passage of a composite compromise measure. We do, however, find the following in the Conference Report with reference to the Senate bill (Congressional Record, page 9251, June 14, 1938) "sec. 9. * * * and the policy is declared that orders relating to wages shall effect only those employees who need legislative protection and shall not interfere with the voluntary establishment of appropriate differentials and higher standards for other employees in the occupation." [fol. 51] While plaintiff's position appears to be supported by the current ruling of the Administrator, Wage and Hour Division of the Department of Labor, who is charged with the administration of the Act, (See Interpretative Bulletin No. 4, 1940, Wage and Hour Manual, 95,

96), it is significant that a former Administrator apparently held a differe t view (Labor Relations Reporter of October 24, 1938; 3 W. H. R. 228); and as late as April 14, 1941, we find an opinion by an Assistant Solicitor of the Wage and Hour Division to the following effect, (4 W. H. R. 181): "The test is, does the employer hire the employee at a salary for a certain number of hours and does he, therefore, owe the employee additional compensation on a pro rata basis when that specified number of hours is exceeded; or can the employer successfully contend that the facts and circumstances of employment are such that the salary is the employee's regular compensation for all hours worked, no matter what the exact number of hours may be. * * * In summing up, we may state the rule as follows: Given an employee employed on a salary basis if is necessary to determine as a matter of fact how many hours of work per workweek the employer may exact from the employee in exchange for such salary. As we stated before, the answer to such question depends upon an examination and evaluation of all of the pertinent facts and circumstances in a given case. We have to know when an employee works 60 hours and receives a salary of $30 in a given workweek, whether or not that $30 is all the employer owes the employee as his regular compensation for a workweek of such length. A test such as the following may prove workable: Is the salaried employee hired to do a job rather than to work a schedule of hours? Does the job necessarily involve irregular or fluctuating hours per day or week? The questions taken together constitute a single test; one question is not complete in itself."

[fol. 52] In Remer v. Czaja,, 36 F. Sup. 629, this Court ruled that an employee whose wages were not reduced below the minimum requirements of the Fair Labor Standards Act, although his wage reduction occurred at the time when wages of fellow employees were increased to meet these minimum requirements, could not recover from his employer the amount of wages of which he was deprived by such reduction. While that decision did not involve the precise question here in issue but had to do with the interpretation to be placed on the last sentence of Section 18 of the Act (29 U. S. C. A. Sec. 218) which reads as follows: "No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or

justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter," the underlying principle which governed this Court in its decision in that case is the same which it is believe- must control here.

Our conclusion also finds support in at least two decisions of other District Courts: Reeves v. Howard County Refining Co., 33 F. Sup. 90, a decision of the District Court for the Northern District of Texas, and Fleming v. Belo, 36 F. Sup. 907, a decision by the same Court, which very recently has been affirmed by the Circuit Court of Appeals, Fifth Circuit. (Fleming, Administrator v. Belo Corp., 121 F. (2d) 207). In the Reeves case the wages of several employees of a refining company were involved. While the Court found that the minimum rates provided by the Act had not been met in all cases, in one instance where further compensation was denied, the Court said (page 91): "Considering the number of hours actually worked, this pay exceeds the minimum time and overtime provided by the Act, and therefore complied with the Act, and the [fol. 53] Court finds that C. C. Reeves is not entitled to recover anything from defendant, he having entered into a contract for a stipulated consideration which is in excess of the minimum wage fixed by law, and that he had a right to make such agreement, and having entered into such agreement, he is bound thereby."

In the A. H. Belo Corporation case, the appellate court, in affirming the decision of the lower Court, gave an elaborate review of the history and underlying purpose of the Fair Labor Standards Act. In that case, the employees had been hired by a newspaper publishing company which made with each of the employees involved a bona fide contract of employment, at a basic hourly rate of pay, providing for payment for overtime work at a rate of not less that one and one-half times such basic rate of pay, with a guaranty that the aggregate pay for regular and overtime work would amount each week to not less than a certain definite sum stated in the contract. There, the Administrator contended that instead of adopting as to each employee the regular hourly rate stipulated in his contract of employment as the overtime rate, which in all cases was more than one and one-half times the minimum rate required by the Act, there should have been adopted a rate arrived at by dividing the weekly salaries of each

employee by the total number of hours worked each week. The lower Court held, and this was affirmed, that nothing in the Act was intended to, or did prevent the employer from contracting with its employees at a rate at which each employee was to be employed so long as such rate was not below the minimum fixed by the Act, and so long as each employee was paid at least one and one-half times such rate for over time work each week.

After analyzing the words employed in the Act, the Appellate Court said (pages 212-215): "When we turn to the legislative history of the act, appellant stands no better. For there is no reference in the whole legislative [fol. 54] history to prohibiting agreements between employer and employee, as here, for all inclusive and regular weekly salaries, none whatever to the effect that it was intended that persons already paying more than the minimum wage the act provided, should be compelled to pay still more. The legislative history of the act, while showing as the legislative history of all new and controversial acts does some individual differences of opinion, adds up to showing, as to the overtime provisions, only what the act shows, that in broad outline the Congress intended that for overtime work, time and a half, the regular rate of pay at which each was employed, should be paid each employee. How that regular rate should be arrived at, when it was fixed above the minimum, was not, for all that appears in the briefs of the parties, and we have not otherwise had access to the debates or committee reports, dealt with in the debates on the bill, either in the original passage of it, or in amendments offered to it, except to say that wages above the minimum must be left to bargaining between employee and employer. When all is said and done, appellant comes in his argument to this point; that the law should be construed as he contends for, because in the opinion of the administrator, the law would better serve its purpose if it were drawn that way. Appellant overlooks the fact that a legislative act in the United States is not as in some countries, a mere general outline by a party or group in power, of the purposes it wishes to accomplish, to be expanded, implemented and given effect by its administrators, in accordance with the general purposes of its proponents. A fundamental fact in American political life, has always been that in the struggle here for laws as means, to make law as liberator effective, there have always been differing

opinions as to the wisdom, propriety and scope of proposed new and controversial laws, and that laws as finally enacted [fol. 55] here, are usually the result of a compromise or at least of an adjustment of these conflicting views.

* * * * * * *

"Freedom of contract, within constitutionally valid limitations, is, in the United States of America, one of the fundamental freedoms and this particularly so in regard to labor relations. When, then, it is contended as here, that a statute has cut off or limited this freedom, a litigant, must point to something more than his opinion that it ought to be cut off or limited, must point to language clearly and validly so providing. There is no more authoritative principle in the field of labor law than that, subject of course, to valid statutes designed to prohibit substandard conditions and unfair labor practices, wages, hours, and work conditions are the proper subject of contract between employer and employee and their agreements must be, and are, given full effect in the courts.

"Here it is undisputed and found by the Court, that, desiring to maintain and continue a system of fixed and regular weekly salaries in strict and full compliance with the Fair Labor Standards Act, employer and employees freely and voluntarily entered into agreements having that effect. These agreements: fixed the regular rate of pay at which each was employed, at a figure considerably above the minimum standard wage the statute fixes; provided for a weekly compensation large enough to pay at least one and one-half times that regular rate for any overtime which he might be required to work each week; and based upon experience over the years, guaranteed a weekly salary to each employee in an amount which would, in some weeks be more, in none less than would be due them, at that rate, for the regular and the overtime hours worked in any week.

* * * * * * *

"Whether Congress could constitutionally fix a minimum wage and then compel employers wishing to provide for [fol. 56] fixed weekly salaries, to pay a wage higher than the minimum so fixed, might raise a serious constitutional question. That question is not before us, for nothing in

the act purports to make this requirement of an employer. Appellant does not so contend. His contention, stripped of all irrelevancies and confusions, really comes down, under the controlling law, to a contention of fact; that the testimony of the employer and its employees that they have agreed as they testified they did, is false; that there was no agreement; that there was mere bookkeeping to give the appearance of reality to an arrangement fictitious in fact, and a fraud upon the act. But in what the fiction or the fraud consists, except that the agreement is not in accord with appellant's views as to the purpose of the act, is not made to appear. It may be that Congress could validly, and should have written a provision into the law forbidding contracts such as those made here, but that is a question for Congress, not for the administrator or the courts. It certainly was not the question the employer and employee were confronted with when they made their agreements. That was not the question the district judge dealt with. It is not the question with which we have to deal. All the district judge was asked to and did decide, was whether the parties made the agreement they claimed to have made and whether they could, in law make such an agreement. We think it perfectly clear that the findings that they could and did, is supported in fact and in law, and that the judgment should be affirmed."

We are not unmindful of the fact that in the Texas decision from which we have just quoted, the contract of employment embraced a stipulation that expressly covered payment for overtime, whereas in the present case, there was no such express stipulation. Further, we are not unmindful of the fact that on this point the Circuit Court of Appeals in the Texas case said by way of dictum (page 211): "In cases where there is no express agreement as to the regular rate at which the employee is employed, [fol. 57] but only an agreement for a weekly wage, appellant's method of arriving at the regular rate by assuming that the wage stipulated for is not intended to cover overtime worked, would, we think, be unexceptionable. But in cases where, as here, the contract of employment fixes the regular rate, that method will not do, for here within the very words of the statute, 'the regular rate at which he is employed', is fixed as to each employee in his contract of employment." However, we do not think that,

on principle, there is any real distinction between the two situations. Each contract was followed in good faith in an attempt to meet the requirements of the law. In the Texas case, the Administrator sought the adoption of the same method for computing overtime wages that the plaintiff here seeks. That method was rejected in the Texas case because the parties were found to have entered into an agreement which, when given full expression as intended by the parties, satisfied the requirements, when fairly interpreted, of the Act. The same we find to be true in the present case.

It is asserted that the result of the interpretation which we here place upon the Act will lay the way open to its evasion by stressing the weekly or monthly character of work and wages or salaries paid; that it will permit employers to defeat the overtime provisions of the Act as to all employees except those whose wages are near the minimum level; that by making overtime more costly, it was intend to *a*pread employment opportunities and thereby to enforce, in effect, a flat prohibition without causing undue hardship to enterprises not readily adaptible to a shorter hour schedule, and that such purpose cannot be accomplished if the overtime provisions of the Act are restricted to those workers who happen to be at the minimum wage level.

In reply to such arguments, we deem it sufficient to say, first that each case must be decided upon its own special facts—we are not here attempting to do more than to [fol. 58] determine the rights of the present plaintiff with respect to his particular work period in question; and second, that this Court will never assume that an employer is attempting to evade the Act merely because his interpretation of it is inconsistent with his employee receiving more wages, such as he might receive under some other interpretation, particularly if such other interpretation has no more substantial support than a form of administrative fiat springing from a desire on the part of the administrative tribunal to produce abstract uniformity in its rulings, regardless of whether it is entirely reasonable so to do.

Accepting, as we may, the propostion that generally speaking the words "the regular rate at which he is employed" as used in the Act, mean the actual hourly rate of pay of the employee computed by dividing his actual weekly wage by the number of hours *customarily* worked,

there is the added reason for not applying that rule in the present case because plaintiff himself, who asserts it, as well as his employer, is unable to state the number of hours that he did work, except for a very limited period, and there was not, and could not be from the inherent character of the work *any customary* number. It might be another thing if the defendant in the present case failed to keep a record of the hours for the express purpose of evading the Act. Enough has already been said to indicate that the present defendant had no such purpose. See where the plaintiff's argument would lead us if uniformity were insisted upon without regard to peculiar facts in individual cases. Let us suppose a case where there is a regular hourly rate of employment which is below the minimum stipulated in the Act. Obviously, in such a case neither the employee nor the Wage and Hour Division would assert that such rate was "the regular rate" at which the employee was employed, for the purpose of determining the amount of wages for overtime. Such a case would be declared a [fol. 59] clear exception to the rule because, by direct implication, there can be no "regular rate" which does not meet the minimum requirements of the Act. So the result is reached by applying a rule of reason to words in their application to a particular case in order to produce a sensible result, which is just what this Court has attempted to do in the present instance.

Contrary decisions appear to have been reached in Fleming v. Carleton Screw Products Co., 37 F. Sup. 754, a decision of the District Court for the District of Minnesota, Fourth Division, and in St. John v. Brown, 38 F. Sup. 385, a decision of the District Court for the Northern District of Texas. The basis, however, of the decision in the first case was that the contested "agreed rate" was found to be merely a device for evading the provisions of the Act, and was not the rate at which the employee was actually employed. The second case involved the wages of ordinary oil field workers; and while general statements occur in the opinion indicating, prima facie, that the conclusion is contra to that here reached, a careful examination of the opinion discloses that, unlike the situation in the A. H. Belo Corporation case, supra, and here, the plaintiff was not at all times being paid as much or more than the minimum statutory rate when applied to both regular and overtime hours.

Finally, and to summarize: We find that the defendant has met the requirements of the Act in this particular case, when fairly interpreted, and that it would be inequitable to permit the plaintiff, through a strained construction of the Act, to recover, retroactively for two years, wages more than 100% in excess of what he voluntarily agreed to accept, and did accept during that period, not to speak of an additional 100% in penalties which he claims.

In view of our conclusion, it becomes unnecessary to consider any of the other points asserted by the defendant by way of defense. For the reasons given, judgment is entered for the defendant, costs to be paid by the plaintiff.

William C. Coleman.

[fol. 60] In United States District Court

[Title omitted]

Notice of Appeal—Filed July 19, 1941

Mr. Clerk:

Notice is hereby given that William H. Missel, Plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the final judgment entered in this action on April 24, 1941.

William O. Tydings, George A. Mahone, Attorneys for Appellant, William H. Missel, 649 Title Building, Baltimore, Maryland.

[fol. 61] In United States District Court

[Title omitted]

Petition of Plaintiff for Permission to Prosecute Appeal in Forma Pauperis and Order of Court Granting Petition—Filed July 22, 1941

Comes now the Plaintiff, by his Attorneys, and respectfully shows unto this Honorable Court as follows:

1—That Plaintiff heretofore sued the Defendant for unpaid overtime compensation, and liquidated damages,

pursuant to Section 16 (B) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Chapter 676, 52 stat.; U. S. C. Title 29, Section 201 et seq.) generally referred to as the Wage and Hour Act.

2—On April 24, 1941, the Court rendered judgment for the Defendant.

3—Plaintiff wishes to take an appeal to the Circuit Court of Appeals, from the decision of the District Court, but because of his poverty he is unable to pay the costs incident to such an appeal or to give security for the same, and that Plaintiff believes he is entitled to the redress he seeks in such appeal.

4—There is attached to this Petition, and made a part thereof, a statement under oath in writing by Plaintiff, as required by U. S. C., Title 28, Section 832.

5—Wherefore, Plaintiff asks that this Court pass an Order permitting Plaintiff to prosecute his appeal In Forma Pauperis as prayed.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

[fol. 62] STATE OF MARYLAND,
City of Baltimore, ss:

Be it remembered, and I hereby certify, that on this 17" day of July, 1941, before me, the subscriber, a Notary Public duly appointed, commissioned and qualified, in and for the State of Maryland, City of Baltimore, aforesaid, and having authority by law to administer oaths therein, personally appeared William H. Missel and made oath in due form of law that he is Plaintiff, and The Overnight Motor Transportation Company, Inc., a body corporate Inc., is Defendant, in the District Court of the United States for the District of Maryland, Civil Action No. 901, in an action under Section 16 (b) of the Fair Labor Standards Act of 1938. That on April 24, 1941, the Court rendered judgment for the Defendant. That in accordance with the provisions of U. S. C., Title 28, Section 832, the said William H. Missel wishes to prosecute an appeal, but because of his poverty he is unable to pay the costs of said appeal or to give security for same, and that he believes he is entitled to the redress he seeks in such appeal. Said William H. Missel deposes that he is married, has 2 children, and his

weekly wage of $40.00 is sufficient only for the maintenance of himself and his family.

William H. Missel.

Sworn and subscribed to before me the day and year first above written. Angela G. Brown, Notary Public. (Seal.)

[fol. 63] ORDER

Upon the foregoing Petition and Affidavit, it is this 22nd day of July, 1941, by the District Court of the United States for the District of Maryland

Ordered:

That permission be and the same is hereby granted to prosecute said Appeal In Forma Pauperis, as prayed.

William C. Coleman, United States District Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO EXTEND THE TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION AND ORDER OF COURT GRANTING MOTION—Filed August 14, 1941

Comes now the Plaintiff, by his Attorneys, and respectfully moves the Court, under Rule 73 (g) of the Rules of Civil Procedure for the District Courts of the United States, to grant an extension of twenty days of time for filing the record on appeal and docketing the action, and assigns as reason therefor the following, to wit:

1—Final judgment for the Defendant was given by the Court on April 24th, 1941.

2—Notice of Appeal was filed with the Clerk of this Court on July 19th, 1941.

3—The written Opinion of the Court was filed July 28th, 1941, and because of its exhaustiveness will require extended study by Counsel.

4—The forty days, from the date of the Notice of Appeal, under Rule 73 (g) expires August 27th, 1941, and which time is felt to be insufficient.

Wherefore, your Petitioner prays that an Order be passed granting an extension of twenty days from the expiration of the forty days from the date of the Notice of Appeal in this cause.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

[fol. 65] ORDER

Ordered, this 14th day of August, 1941, by the District Court of the United States, for the District of Maryland, that the time for filing the record on appeal with the appellate court and there being docketed be, and the same is hereby extended, as prayed, for a period of twenty days from the expiration of the forty days from the date of the Notice of Appeal in this cause.

William C. Coleman, United States District Judge.

[fol. 66] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AND DESIGNATION OF RECORD ON APPEAL—Filed September 3, 1941

As provided by rule 75 (f) of the Rules of Civil Procedure for the District Courts of the United States, it is hereby stipulated and agreed by Counsel for the Parties hereto that the Clerk of the Court will prepare the Record on Appeal in the above-entitled cause and include therein the following:

1—Bill of Complaint.

2—Defendant's Motion to Dismiss Bill of Complaint.

3—Opinion of Court overruling Motion to Dismiss.

4—Answer of Defendant to Bill of Complaint.

5—Motion of American Trucking Association, Inc., for leave to intervene Amicus Curiae, and Order granting such leave.

6—Stipulations of Facts filed by parties hereto.

7—Motion of Plaintiff and Order of Court granting leave to amend Bill of Complaint herein.

8—Order of Court granting Judgment for Defendant.

9—Plaintiff's Notice of Appeal to United States Circuit Court of Appeals.

10—Petition of Plaintiff and Order of Court granting permission to prosecute appeal in forma pauperis.

[fol. 67] 10½—Opinion of Court.

11—Petition of Plaintiff and Order of Court granting extension of time for filing record and docketing same in the Court of Appeals.

12—Court Stenographer's transcript of "Extract From Discussion".

13—This Stipulation and Designation of Record.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff. John R. Norris, J. Ninien Beall, Clayton W. Daneker, Attorneys for Defendant. J. Ninian Beall, John R. Norris, Attorneys for Intervenor.

[fol. 68] In United States District Court

Memorandum of the Clerk

1. Notice of Appeal filed 19 July, 1941.

2. Petition of Plaintiff and Order of Court granting permission to prosecute appeal in Forma Pauperis filed 22nd July, 1941.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 69] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4867

WILLIAM H. MISSEL, Appellant,

versus

THE OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., a Body Corporate, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

September 19, 1941, the transcript of record is filed and the cause docketed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR PERMISSION TO PROSECUTE APPEAL IN FORMA PAUPERIS—Filed September 19, 1941

To the Honorable, the Judges of Said Court:

Comes now the Plaintiff, by his Attorneys, and respectfully shows unto this Honorable Court as follows:

1. That Plaintiff, in the District Court of the United States for the District of Maryland, sued the Defendant for unpaid overtime compensation, and liquidated damages, pursuant to Section 16 (B) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Chapter 676, 52 Stat.; U. S. C. Title 29, Section 201 et seq.) general- referred to as the Wage and Hour Act.

2. On April 24, 1941, the United States District Court for the District of Maryland rendered judgment for the Defendant.

3. Plaintiff wishes to take an appeal to this Circuit Court of Appeals, from the decision of the said District Court, but because of his poverty he is unable to pay the costs incident to such an appeal or to give security for the same, and that Plaintiff believes he is entitled to the redress he [fol. 70] seeks in such appeal.

4. There is attached to this Petition, and made a part thereof, a statement under oath in writing by Plaintiff, as required by U. S. C. Title 28, Section 832.

5. Wherefore, Plaintiff asks that this Court pass an Order permitting Plaintiff to prosecute his appeal in Forma Pauperis as prayed.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

STATE OF MARYLAND,
City of Baltimore, ss:

Be It Remembered, and I hereby certify that on this 17" day of July, 1941, before me, the subscriber, a Notary Public duly appointed, commissioned and qualified, in and for the State of Maryland, City of Baltimore, aforesaid, and having authority by law to administer oaths therein, personally appeared William H. Missel and made oath in due form of law that he is Plaintiff, and The Overnight Motor Transportation Company, Inc., a body corporate Inc., is Defendant, in the District Court of the United States for the District of Maryland, Civil Action No. 901, in an action under Section 16 (b) of the Fair Labor Standards Act of 1938. That on April 24, 1941, the Court rendered judgment for the Defendant. That in accordance with the provisions of U. S. C., Title 28, Section 832, the said William H. Missel wishes to prosecute an appeal, but because of his poverty he is unable to pay the costs of said appeal or to give security for same, and that he believes he is entitled to the redress he seeks in such appeal. Said William H. Missel deposes that he is married, has 2 children, and his weekly [fol. 71] wage of $40.00 is sufficient only for the maintenance of himself and his family.

William H. Missel.

Sworn and subscribed to before me the day and year first above written. Angela G. Brown, Notary Public. (Seal of Notary.)

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER PERMITTING APPELLANT TO PROSECUTE APPEAL IN FORMA PAUPERIS—Filed September 19, 1941

Upon the Affidavit and Petition of the appellant, and for good cause shown,

It Is Ordered By The Court that the appellant in the above-entitled cause be, and he is hereby, permitted to prosecute his appeal in this Court *in forma pauperis*, and that he file six typewritten copies of his brief and appendix instead of twenty-five printed copies as required by the rules.

John J. Parker, Senior Circuit Judge.

September 18, 1941.

IN UNITED STATES CIRCUIT COURT OF APPEALS

RECITAL RE APPEARANCES

September 23, 1941, the appearance of William O. Tydings and George A. Mahone is entered for the appellant.

September 29, 1941, the appearance of John R. Norris, Clayton W. Daneker and J. Ninian Beall is entered for the appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF AMERICAN TRUCKING ASSOCIATIONS, INC., TO INTERVENE AS "AMICUS CURIAE"—Filed October 6, 1941

American Trucking Associations, Inc., moves for leave to intervene as Amicus Curiae in the Appeal in this action, in order to assert the defenses to be set forth in a Brief to [fol. 72] be filed, and with oral argument thereof, before this Honorable Court, the ground for said intervention being that the American Trucking Associations, Inc. is the national trade association of the trucking industry, the members of which are vitally affected by the issues involved in said cause in which the decision will establish an important precedent.

And Whereas, it is the duty of the applicant for intervention to protect the interests of its members in litigation matters of national importance in which precedents may be established, and said Association has heretofore been the active party in all prior proceedings before the Congressional Committees, Interstate Commerce Commission, United States District Court (31 Federal Supplement 35)

and United States Supreme Court (310 U. S. 534; rehearing denied 61 S. Ct. 53).

And Whereas, the applicant for intervention prayed and was granted leave to intervene as Amicus Curiae in this action before the District Court of the United States for the District of Maryland,

And Whereas, the applicant for intervention actively participated in the trial of this case before said District Court of the United States for the District of Maryland,

Now, Therefore, comes the applicant for intervention and prays this Honorable Court to grant its motion for leave to intervene as "Amicus Curiae" to file a Brief and present oral argument herein.

J. Ninian Beall, Attorney for American Trucking Associations, Inc., 1424 16th St., N. W., Washington, D. C. John R. Norris, 1513 Fidelity Bldg., Baltimore, Md.

[fol. 73] In United States Circuit Court of Appeals

Consents of Parties to Intervention of American Trucking Associations, Inc.

William H. Missel by William O. Tydings and George A. Mahone, his attorneys, consents to the intervention of American Trucking Associations, Inc., as "Amicus Curiae".

William O. Tydings, George A. Mahone, Attorneys for Appellant.

Overnight Motor Transportation Co., Inc., a body corporate, consents by its attorneys, John R. Norris, J. Ninian Beall and Clayton W. Daneker; to the intervention of American Trucking Associations, Inc., as "Amicus Curiae".

John R. Norris, J. Ninian Beall, Clayton W. Daneker, Attorneys for Appellee.

In United States Circuit Court of Appeals

Order Granting Leave to American Trucking Associations, Inc., to File Brief as Amicus Curiae—Filed and Entered October 6, 1941

Upon the Motion of the American Trucking Associations, Inc., by its counsel, J. Ninian Beall and John R. Norris,

Esqs., and the consent of counsel for the respective parties in the above entitled case,

Leave is hereby granted the said American Trucking Associations, Inc., to file a brief as *amicus curiae* in this case.

John J. Parker, Senior Circuit Judge.

October 6th, 1941.

October 17, 1941, brief and appendix on behalf of the appellant are filed.

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, FOR LEAVE TO FILE A BRIEF AND PRESENT ORAL ARGUMENT AS AMICUS CURIAE—Filed October 17, 1941

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, by his undersigned attorneys, respectfully moves this Court for leave to file a brief of more than fifty printed pages in length, but not to exceed 80 pages, and to present oral argument as *amicus curiae* in the above-entitled cause on the question involved in this appeal as to the proper interpretation and application of Section 7 of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. V, Sec. 201 *et seq.*).

1. The Administrator of the Wage and Hour Division of the United States Department of Labor is charged with the responsibility and duty of administering and enforcing the Act, and the appeal in this case presents questions which are of public interest and importance.

2. Section 7 (a) of the Act provides that no employer shall employ any of his employees who are engaged in interstate commerce or in the production of goods for interstate commerce for a workweek longer than that specified therein "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Appellant, as plaintiff, asserted a claim in the alternative according to two distinctly different interpretations of Sec-

tion 7(a); appellee, as defendant, asserted as a defense to plaintiff's claim a third distinctly different interpretation of Section 7(a). The court below based its judgment for de-
[fol. 75] fendant upon the interpretation advocated by defendant. The Administrator is of the opinion that the interpretation of Section 7(a) by the court below is erroneous, and that one of plaintiff's alternative interpretations is correct, namely, that "regular rate" as used in Section 7(a) means the hourly rate arrived at by dividing plaintiff's weekly salary by the number of hours he actually worked in each workweek. This interpretation has been advocated by the Administrator and sustained by federal district courts in numerous cases. To date it has been passed upon by only one United States Circuit Court of Appeals, namely, in *Fleming* v. *A. H. Belo Corp.*, 121 F. (2d) 207 (C. C. A. 5th), wherein a statement in the opinion of that court appears to have sustained the Administrator's interpretation notwithstanding the court denied its application in that case because of facts and circumstances which do not appear to be involved in the case at bar. In the *Belo* case a petition for certiorari has been filed in the Supreme Court of the United States.

In the administration and enforcement of the Act by the Administrator the question of the interpretation of Section 7 and the meaning of "regular rate" arises more frequently than any other single question. Every case involving Section 7 of the Act necessarily turns on the meaning of "regular rate at which he is employed." Accordingly, the interpretation and application of Section 7(a) by this Court, in the above-entitled cause, is of vital interest to the public, and to the Administrator in the discharge of his responsibility and duty of administering and enforcing the Act.

[fol. 76] Irving J. Levy, Acting Solicitor of Labor; John E. Skilling, Supervising Attorney; Beverly R. Worrell, Regional Attorney, United States Department of Labor, Attorneys for Philip B. Fleming, Administrator of the Wage and Hour Division.

Service acknowledged and motion consented to:

George A. Mahone (of Counsel), Attorney for Appellant. John R. Norris (of Counsel), Attorney for Appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING LEAVE TO PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, TO FILE BRIEF AS AMICUS CURIAE—Filed and Entered October 17, 1941

Upon the Application of Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor, by John E. Skilling, Supervising Attorney, and Beverley R. Worrell, Regional Attorney, his attorneys, consented to by counsel for the appellant and appellee, and for good cause shown,

Leave is hereby granted the said Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor, to file a brief not in excess of 80 printed pages, as amicus curiae, in the above entitled case.

John J. Parker, Senior Circuit Judge.

October 17, 1941.

IN UNITED STATES CIRCUIT COURT OF APPEALS

RECITAL RE FILING BRIEFS AND APPENDIX

November 5, 1941, brief of American Trucking Associations, Inc., as *amicus curiae*, filed.

Same day, brief and appendix on behalf of the appellee are filed.

[fol. 77] November 11, 1941, brief of Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae*, filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

RECITAL RE ARGUMENT OF CAUSE

November 19, 1941, (November term, 1941) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 78] In United States Circuit Court of Appeals, Fourth Circuit

No. 4867

William H. Missel, Appellant,

versus

The Overnight Motor Transportation Company, Inc., a Body Corporate, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

(Argued November 19, 1941. Decided January 5, 1942)

Before Parker, Soper and Dobie, Circuit Judges.

George A. Mahone (William O. Tydings on brief) for Appellant; John R. Norris and J. Ninian Beall (Clayton W. Daneker on brief) for Appellee; John E. Skilling, of Counsel for Administrator of the Wage and Hour Division, U. S. Department of Labor, (Warner W. Gardner, Solicitor, Irving J. Levy, Assistant Solicitor, Beverly R. Worrell, Regional Attorney, and Jacob D. Hyman, of Counsel for Administrator of the Wage and Hour Division, U. S. Department of Labor, on brief) as *amicus curiae*, and J. Ninian Beall and John R. Norris on brief of American Trucking Association, Inc., as *amicus curiae*.

Opinion—Filed January 5, 1942

[fol. 79] Dobie, Circuit Judge:

This is an appeal from a final judgment of the District Court of the United States for the District of Maryland entered for the defendant in an action brought by appellant, as plaintiff, to recover from appellee, defendant, unpaid overtime compensation alleged to be due under Section 7(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060-1069 (1938), 29 U. S. C. A. §§201-219 (Supp. 1939) (hereinafter referred to as the Act), and an additional amount as liquidated damages, together with reasonable attorney's fees and costs of the action, as provided in Section 16(b) of the Act. The opinion of the District Court is reported in 40 F. Supp. 174. The case presents the problem of computation of overtime pay under the Act. Since this in turn presents questions of interpretation and rights and liabilities under the Act which are of considerable public interest and importance,[1] the Admin-

istrator, pursuant to leave granted by this Court, was permitted to submit a brief as *amicus curiae*, and to argue the case before this Court through counsel, confining his discussion to questions of interpretation of the Act involved in this appeal.

The case was tried on the complaint, answer, amendment to the complaint, and stipulation of facts by the parties. Accordingly, we adopt the statement of facts set out in the brief for the Administrator. Defendant admitted the following facts: that the court below had jurisdiction over the parties and the subject matter; that the defendant was licensed to engage, and was engaged, in the business of motor transportation of freight in interstate commerce and had employed plaintiff in that business; that all duties performed by plaintiff for defendant were "in commerce"; [fol. 80] that none of the duties performed by plaintiff was that of a driver, driver's helper, loader, or mechanic, as defined by the Interstate Commerce Commission in its decision of March 4, 1941, in *Ex Parte* MC-2 and MC-3; rather his duties were those of a rate clerk, cashier, and dispatcher; and that defendant kept no records of hours worked by plaintiff prior to June 14, 1940.

The parties agreed that plaintiff began to work for defendant on November 26, 1937, at a salary of $23 per week, plus supper money of $2.50 per week, and that after November 1, 1938, he worked for a salary of $25 per week, plus supper money of $2.50 per week, and that he worked a varying number of hours per workweek from the time his employment began, prior to the effective date of the Act, until his employment terminated on October 19, 1940. It was further agreed that in at least two workweeks during the period from October 24, 1938, to October 23, 1939, plaintiff was on duty 80 hours; that in at least three workweeks during the period from October 24, 1939, to October 19, 1940, plaintiff was on duty 75 hours. The issues raised by the pleadings as to hours worked in other workweeks were not tried or adjudicated. Plaintiff's offer of testi-

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[1] It is estimated that the eventual outcome of this case will have a powerful impact and profound effect on many million "white-collar" workers getting more than the statutory minimum wage. See Magazine of Modern Industry, Oct. 15, 1941, p. 42. If the decision of the lower court stands, the Wage-Hour division contends it will largely eliminate the law's benefits for them.

mony was rejected by the court as unnecessary for adjudication of the controlling legal question raised by the facts agreed upon.

Plaintiff argued, in the alternative, that his regular rate of pay is to be determined either by dividing the number of hours worked each workweek into his weekly wage, or by dividing the applicable statutory maximum hours (44 or 42) into the weekly wage. Defendant contended that plaintiff was employed at a weekly salary to do a job which necessarily involved irregular hours rather than to work a fixed schedule of hours, and, therefore, the sole effect of the Act was to fix a minimum wage for all hours worked and overtime compensation at time and one-half the statutory minimum rate per hour for hours worked in excess of the statutory maximum. It was admitted by the [fol. 81] parties that the contract of employment was not evidenced by any writing; that plaintiff was hired to work for no specific number of hours per day or week and that these hours varied greatly from day to day.

The court below found that the plaintiff's weekly wage (plus supper money) was more than the total minimum wages prescribed by the Act plus one and one-half times such minimum rate for the overtime hours actually worked by the plaintiff, and that defendant, accordingly, had not violated the Act. The court held that the overtime provisions of the Act were primarily minimum wage provisions, and were therefore satisfied if an employee was paid at time and one-half the statutory minimum rate for each overtime hour. The court's opinion is predicated on the premise that the purpose of the Act is to establish and gradually raise minimum wages, and that the overtime provisions were inserted, not to discourage or limit overtime work, but merely as part of a plan to raise substandard wages by providing definite pay for overtime work.

The pertinent section of the Act, which is the crux of this case, is Section 7(a), 52 Stat. 1063 (1938), 29 U. S. C. §207(a) (Supp. 1939).[2] Section 7(a), dealing with maximum hours, provides:

[fol. 82] "No employer shall, except as otherwise provided in this section, employ any one of his employees who

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[2] The minimum wage Section of the Act is Section 6(a), 52 Stat. 1062 (1938), 29 U.S.C. §206(a) (Supp. 1939) which provides: "Every employer shall pay to each of his em-

is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate *not less than one and one-half times the regular rate at which he is employed.*" (Italics added.)

In their oral argument before this Court, counsel for the plaintiff and counsel for the Administrator contended that Section 7(a) is primarily a maximum hours provision and hence an employer must pay one and one-half times the *actual wage* the employee is receiving for overtime. On the other hand, counsel for the defendant argued, in line with the reasoning of the lower court, that Section 7(a) is primarily a minimum wage provision and hence an employer is entitled to pay one and one-half times the statutory *minimum wage* for overtime. Thus, the important question presented on this appeal is whether "regular rate" as used in Section 7(a) means the hourly rate ar-

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ployees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour. . . ."

Both Sections 6 and 7 became effective October 24, 1938. The flat statutory minimum of 40 cents becomes effective June 25, 1945. "A minimum wage of 40 cents will yield an annual income of $800 a year to those continually employed for 50 weeks. No fair-minded person would suggest that this amount is too much to maintain the minimum American standard of living." H. R. Rep. No. 1452, 75th Cong., 1st Sess. (1937) 9. See also H. R. Rep. No. 2738 (Conference Report), 75th Cong. 3rd Sess. (1938) 28.

rived at by dividing plaintiff's actual weekly wage by the number of hours actually worked in each workweek,[3] or whether it means the statutory minimum rate. This, of course, raises the broad question as to what the real purpose of Section 7(a) of the Act is.

[fol. 83] We are unable to agree with the lower court that the primary purposes of the Fair Labor Standards Act are satisfied by the payment of time and one-half the statutory minimum wage for overtime. Furthermore, we do not believe that Section 7(a) is merely part of a broad scheme of minimum wage regulation.[4]

Purpose of Section 7(a) of the Fair Labor Standards Act

Every statute born of economic and social pressure, attempting to harmonize discordant socio-economic forces, must be viewed in the framework of conditions aimed to be remedied thereby. Consequently, it is vital that the Congressional findings and declaration of policy set forth in the Act be examined with care. The findings of Congress, as set forth in Section 2(a), are that the existence in industries engaged in commerce of substandard labor conditions do not conduce to the maintenance of minimal health,

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[3] No authority has been found for plaintiff's alternative contention that regular rate of pay is to be computed by dividing the applicable statutory maximum hours (44 or 42) into the weekly wage. Accordingly, we reject this contention.

[4] Federal control over wages, hours, and working conditions is exerted under other measures besides the Fair Labor Standards Act. The Walsh-Healey (Public Contracts) Act, 49 Stat. 2036 (1936), 41 U. S. C. §35 (Supp. 1939), requires sellers of goods in excess of $10,000 to the United States to pay minimum wages determined by the Secretary of Labor, to observe the eight-hour day and forty-hour week, and to abstain from use of child and convict labor. The Bacon-Davis Act, 46 Stat. 1494 (1931), 40 U. S. C. §276 (a) (1934), authorized the Secretary of Labor to establish minimum wages for employees constructing public buildings of the United States. Prior statutes had established the eight-hour day for such laborers. 37 Stat. 137 (1912), 40 U. S. C. §324 (1934). The Merchant Marine Act, 49 Stat. 1992 (1936) as amended 52 Stat. 954 (1938), 46 U. S. C. §1131 (Supp. 1939), authorizes

living, and general welfare standards of workers employed therein; that the free flow of commerce is burdened thereby; that unfair competition, labor disputes and disorderly marketing result. The declaration of policy is unequivocally set out in Section 2(b) where it is declared to be the policy [fol. 84] of Congress in the exercise of its commerce power to correct and eliminate these burdensome conditions without substantial impairment of employment or earning power. As was stated by the Chief Justice of the United States: "* * * the motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." See *United States* v. *Darby Lumber Co.*, 312 U. S. 100. The objectives of the Act, as expressed, demonstrate that the Act, comprehensive in its purpose and remedial in character, should be liberally construed. See *Bowie* v. *Gonzales*, 117 F. (2d) 11, 16; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56; *Fleming* v. *A. B. Kirschbaum Co.*, 38 F. Supp. 204, 206. Only in this way can the coordination of our economic life and the elimination of unfair differentials in labor conditions be effectively achieved.[5]

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the Maritime Commission to fix minimum wages and working conditions for all officers and crews employed on vessels receiving "an operating differential subsidy". The Sugar Act of 1937, 50 Stat. 909 (1937), 7 U. S. C. §1131 (Supp. 1939), authorizes the Secretary of Agriculture to condition benefit payments upon compliance with statutory regulations of child labor, and with wage rates determined by the Secretary to be fair and reasonable.

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[5] Proponents of wage and hour legislation contend that these laws do not necessarily raise production cost and selling price. It seems to be the consensus of opinion, however, that the tendency of such laws is to increase the cost to the consumer. See Douglas, Economic Theory of Wage Regulation (1938) 5 U. of Chi. L. Rev. 184. "The fixation of wages has been justified by the administration and its supporters on three grounds, namely, that: (1) it was necessary to protect workers from the pressure of com-

The President's message to Congress of May 24, 1937,[6] [fol. 85] asserted the necessity for governmental control over maximum hours, minimum wages, the evil of child labor and the exploitation of unorganized labor. In that message, he expressed the hope that the right of the government to change working hours would decrease unemployment in those groups in which unemployment principally existed.[7] It seems plain from the legislative history of the Act[8] that, in addition to attempting to establish a decent national level of working conditions,[9] one of the fundamental purposes of the Act was to induce worksharing and

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petition, or from the combination in wage matters of monopoly; (2) it was desirable to check downward spirals of wage-cutting with an attendant demoralization of market prices and a proportionate increase in the relative weight of fixed charges; (3) an increase in wage rates would, it was alleged, increase the total quantity of effective purchasing power, and hence increase the demand for mass production goods and services." See Douglas and Hackman, The Fair Labor Standards Act of 1938 I (1938) 53 Pol. Sci. Quar. 491. It is, of course, not the Court's function to approve or disapprove the economic wisdom of Congressional findings. See Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 245, where Congressional findings of an economic nature were accepted by the Supreme Court.

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[6] H. R. Rep. No. 1452, 75th. Cong., 1st. Sess. (1937) 5. See Sen. Rep. 884, 75th. Cong., 1st. Sess. (1937) 1.

[7] H. Doc. 255, 75th. Cong., 1st. Sess. (1937) 4.

[8] On admissibility and the relative weight to be assigned to committee reports, hearings, debates, etc., see Jones, Statutory Doubts and Legislative Intent (1940) 40 Colum. L. Rev. 957; Jones, Extrinsic Aids in the Federal Courts (1940) 25 Iowa L. Rev. 737; Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes (1939) 25 Wash. U. L. Q. 2.

[9] See 81 Cong. Rec. 7652, 7793 (1937); Sen. Rep. No. 884, 75th. Cong., 1st. Sess. (1937) 1, 3, 4; H. R. Rep. No. 1452, 75th. Cong., 1st. Sess. (1937) 9. See also Douglas and Hackman, The Fair Labor Standards Act of 1938: I 53 Pol. Sci. Quar. 491.

relieve unemployment by reducing hours of work.[10] In *Williams* v. *General Mills*, 39 F. Supp. 849, 952, the court said:

"The evil was not so much in the length of time men worked but with nine, ten, or twelve million unemployed in this country, the problem was to cut into that unemployment without financially hurting industry or its employees. It was hoped to cut at least four or five million from the unemployment ranks. This it appears was the big objective of the Wages and Hour and Fair Labor Standards Act."

That the overtime provisions of the Act are aimed at re-employment and designed for economic and social purposes, as well as to protect the health or welfare of the employees, seems obvious from the omission of any absolute limitation upon weekly hours of work if properly com- [fol. 86] pensated, and the absence of any limitation upon daily hours.[11]

Not only may an employee be worked twenty-four hours per day; but one hundred and twenty-four hours of overtime per week would not violate the law so long as the employee was paid for all such overtime at the required rate. "'The Act is not, as the company contends, merely a wage statute.'" *Sunshine Mining Co.* v. *Carver.*, 4 Wage Hour Rept. 480, 481 (D. Ohio). Of course the argument for shorter hours is partly justified on the grounds of the added satisfaction which the workers would obtain, but one of the primary purposes was to make it possible for more workers to be added to the payroll.[12] One of the impelling forces behind the Act is the effort to promote eco-

[10] H. R. Rep. No. 1452, 75th. Cong., 1st. Sess. (1937) 9, 14. See Cooper, The Coverage of the Fair Labor Standards Act and Other Problems in its Interpretation (1939) 6 Law & Contemp. Problems 350, 352; Cooper, "Extra Time for Overtime" Now Law (1938) 37 Mich. L. Rev. 28, 31; Note (1939) 52 Harv. L. Rev. 646, 665, 677.

[11] See Chart Showing State and Federal Hour Limitation (1938) U. S. Dept. of Labor (test of true hour law is a limitation on both daily and weekly hours of work). See (1939) 2 Wage Hour Rept. 5, for A. F. of L. criticism of absence of daily limitation. Cf. Wilson v. New, 234 U. S. 322.

[12] See Douglas and Haekman, The Fair Labor Standards Act of 1938: I (1938) 53 Pol. Sci. Quar. 491.

nomic stability through increased purchasing power.[13] These purposes of the Act are accomplished because the overtime provisions of the Act, requiring employers to pay an extra bonus or penalty for such work, distinctly tend to discourage overtime. This is on the theory that the overtime rate established by the Act will be sufficiently expensive to compel employment of new men, and that employers rather than pay overtime will spread employment.[14]

A great majority of the courts have recognized that Section 7(a) of the Act plainly imposes a requirement which [fol. 87] tends to discourage long hours of labor and that Congress intended[15] it to have just that effect. Otherwise, employers would be permitted to defeat the overtime provisions of the Act as to all employees save those whose wage was near the minimum level. In *St. John* v. *Brown*, 38 F. Supp. 385, 390, the Court said:

"The 'one and one-half times' provision is akin to a penalty, intended to discourage overtime employment and to encourage a greater spread of employment. It must be remembered that Section 6 is a minimum wages Act, and Section 7 is a maximum hours Act; that they are really two Acts in the same bill."

In *Dubois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541, 542 (C. A. Ohio), the Court said:

"Work for a greater number of hours is incompatible with the general welfare and must be discouraged by requiring the employer to pay at the higher rate for all time in excess of the maximum."

[13] See Joint Hearings before the Committee on Education and Labor, U. S. Senate, and the Committee on Labor, House of Representatives, on S. 2475 and H. R. 7200, 75 Cong., 3rd. Sess. (1937) 93, 237, 307, 334, 597, 646, 918, 1079, 1117. See also H. R. Rep. No. 1452, 75th Cong., 1st. Sess. (1937) 9. See Herman, The Administration and Enforcement of the Fair Labor Standards Act (1939) 6 Law & Contemp. Problems 372.

[14] See Cooper, "Extra Time for Overtime" Now Law (1938) 37 Mich. L. Rev. 28, 31.

[15] For a good discussion of "Congressional intent" see Radin, Statutory Interpretation (1930) 43 Harv. L. Rev. 863; Landis, A Note on Statutory Interpretation (1930) 43 Harv. L. Rev. 886.

Similarly in *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754 [16], the Court said (at p. 758):

"Section 7 does not purport to regulate wages but imposes a penalty on overtime work, regardless of what the rate of pay may be, thus making overtime work more costly to the employer and creating more employment by limiting the hours of labor."

See also *Williams* v. *General Mills*, 39 F. Supp. 849, 851; *Sunshine Mining Co.* v. *Carver*, 4 Wage Hour Rept. 480 (D. Idaho); *Drake* v. *Hirsh*, 40 F. Supp. 290; *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300; *Abroe* v. *Lindsay Bros. Co.*, 4 Wage Hour Rept. (Minn. Sup. Ct.); [fol. 88] *Haddad* v. *Beckerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.); *Angel* v. *Dayton Veneer & Lumber Mills*, 4 Wage Hour Rept. 471 (M. D. Ga.); *Wilkerson* v. *Swift & Co.*, 4 Wage Hour Rept. 305 (N. D. Tex.); [17] *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn.); *Wagner* v. *Estate of Abe Field*, 4 Wage Hour Rept. 329 (Super. Ct. Ind., Allen Co.); *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn., Ramsey Co.)[18]; *Hargrave* v. *Mid-Continent Petroleum Corp.*, 4 Wage Hour Rept. (E. D. Okla.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich., Ingham Co.); *McLenden* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex.); *Graves* v. *Armstrong Creamery Co.*, 10 U. S. L. Week 2320 (Sup. Ct. Kan.).

Furthermore, we think it is not without significance that the Supreme Court of the United States in sustaining the constitutionality of Section 7(a) in *United States* v. *Darby Lumber Co.*, 312 U. S. 100, relied heavily on prior cases dealing with maximum hour statutes. The Supreme Court in the Darby case said:

"Nor is it any longer open to question that it is within the legislative power to fix maximum hours, *Holden* v. *Hardy*, 169 U. S. 366; *Muller* v. *Oregon*, 208 U. S. 412."

[16] Now on appeal to the Circuit Court of Appeals for the Eighth Circuit.

[17] Now on appeal to the Circuit Court of Appeals for the Fifth Circuit.

[18] Now on appeal to the Supreme Court of Minnesota.

That Section 7(a) was designed to regulate hours of work is not only implicit in the *Darby* opinion, but by its separate discussion of Sections 6 and 7 and its reliance upon prior maximum hour decisions, the Supreme Court seems already to have given its imprimatur to the "maximum hour" interpretation which we here adopt.[19]

[fol. 89] Certain it is that the Wage and Hour Division considers Section 7(a) was directly aimed at a regulation of hours. As stated by Administrator Elmer F. Andrews in picturesque language, the primary purposes of the Act are to fix a floor for wages, a ceiling for hours, and a break for children.[20] The interpretation urged upon the Wage and Hour Division was that the overtime provisions of the Act applied only to employees paid the basic minimum wage rate and that the Act essentially was only a "poor man's" minimum wage law.[21] This interpretation was re-

[19] Subsequently, in *Olsen* v. *Nebraska*, 313 U. S. 236, the Supreme Court said (at p. 245): "And at this term we upheld the minimum wage and *maximum hours provisions* of the Fair Labor Standards Act of 1938. *United States* v. *Darby*, 312 U. S. 100." (Italics supplied.)

[20] See 3 Fed. Bar Ass. Jour. 333. It is likewise indisputable that the popular designation of the Fair Labor Standards Act has always been that of a *Wages* and *Hours* Act.

[21] Of the thirty-six and a half million workers gainfully employed in the United States it has been estimated that eleven million fall within the protection of the Act. See *Interim Report of the Wage and Hour Division*—Aug. 15th. to Dec. 31st, 1938, U. S. Dept. of Labor, I—10B. The Report at page 10 gives the following statistics on the economic coverage of the Act and number of employees affected:

No. of employees covered by the Act—11,000,000

No. of employees receiving less than 25c per hour—300,000

No. of employees receiving less than 30c per hour—350,000

No. of employees receiving less than 40c per hour—1,418,000

No. of employees working more than 44 hours weekly—1,384,000

No. of employees working more than 42 hours weekly—1,751,000

No. of employees working more than 40 hours weekly—2,184,000

jected, and the official interpretation is that the overtime provisions of the Act extend to all employees whatever may be the wage paid.[22] A similar interpretation was urged upon this Court, and we reject it too. Since the overtime provisions of the Act were designed to spread employment opportunities by making overtime more costly, it is obvious that this purpose cannot be achieved if the overtime provisions are to be restricted to those workers at the minimum wage level. A vast majority of the courts have recognized in consequence that the Act does apply to employers paying in excess of the minimum wages prescribed in the Act. E. g., *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. [fol. 90] 754; *St. John* v. *Brown*, 38 F. Supp. 385; *Allen* v. *Moe*, 39 F. Supp. 5; *Drake* v. *Hirsch*, 40 F. Supp. 290; *Sunshine Mining Co.* v. *Carver*, 4 Wage Hour Rept. 480 (D. Idaho); *DuBois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541 (C. A. Ohio), affirming *Floyd* v. *DuBois Soap Co.*, 4 Wage Hour Rept. 77 (C. P. Hamilton Co., Ohio); *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn.).

We are not unmindful of the fact that several courts have rejected the "maximum hour" interpretation of Section 7(a) which we here adopt and are wedded to a "minimum wage" theory of that Section. See *Fleming* v. *A. H. Belo Corp.*, 121 F. (2d) 207 (C. C. A. 5th, 1941), *cert. granted*, 10 U. S. L. Week 3137; *A. H. Belo Corp.* v. *Street*, 36 F. Supp. 907; *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90; *Bumpus* v. *Continental Baking Co.*, No. 211, W. D. Tenn., April 29, 1941[23]; *Fleming* v. *Atlantic*, 40 F. Supp. 654; *Fleming* v. *Stone*, 4 Wage Hour Rept. 560 (N. D. Ill.); *Gurtov* v. *Volk*, 170 Misc. 322, 11 N. Y. S. (2d) 604 (Munic. Ct. N. Y. 1939). In the *Belo* case, the Court said (at pp. 211 and 212):

"Section 7, the section in question, does not at all fix maximum hours. * * * The purpose of the Act is to establish and gradually raise minimum wages, *the overtime provisions in it are inserted not at all to discourage or limit*

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[22] Interpretative Bulletin No. 14, 1940 Wage & Hour Man. 95.

[23] Reversed by the Circuit Court of Appeals for the Sixth Circuit, Dec. 10, 1941.

*overtime but as a part of the scheme to raise substandard wages. * * *.*" (Italics ours.)

We are unable to agree with the Circuit Court of Appeals for the Fifth Circuit that the overtime provisions of the Act are merely part of a scheme to raise substandard wages. Rather we conclude that the purpose of Section 7(a) is to eliminate long hours of labor by requiring employers to pay extra compensation for overtime work. Otherwise the guarantees of the Act become "only a prom-[fol. 91] ise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."[24]

Meaning of "Regular Rate" as Used in Section 7(a)

As we have already indicated, the court below adopted a "minimum wage" theory of Section 7(a) and consequently concluded that the overtime provisions of the Act are satisfied by the payment of one and one-half time- the statutory minimum rate for each overtime hour—"regular rate" and "minimum rate" becoming synonymous. This interpretation makes the overtime provisions of the Act effective only as to employees in the lowest wage brackets. Since we have adopted a "maximum hour" interpretation of Section 7(a), it follows as the night the day that we must reach a different conclusion. We think it is clear that "regular rate" of pay means the *actual* rate of pay which the employee is receiving no matter how high, and not the minimum rate set forth in the statute.[25]

"In no other way could the coercive effect of the provision for one and one-half times the regular rate for overtime be brought into operation as clearly intended by Congress." *DuBois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541 (C. A. Ohio).

Congress must have had in mind the fact that many employees who were within the policy of the Act would receive wages in excess of the minimum and hence it is

[24] Quoted from Mr. Justice Jackson in *Edwards* v. *California*, 10 U. S. L. Week 4037, 4041 (U. S. 1941).

[25] Thus, an employer paying $24 for a 48-hour week is not complying with the statute simply because the employees receive the equivalent of 25 cents an hour and 37½ cents for each hour in excess of 44. The employees must be paid 50 cents for the first 44 hours and 75 cents for the last four, a total of $25.

difficult to see how the objective of discouraging excessive overtime can be accomplished if "regular rate" is to be construed as meaning "minimum rate". Such a construction would wholly defeat this policy, for if an employee was getting a fairly high wage, one and one-half times the [fol. 92] minimum would in such a case be less than the actual wage the employee was receiving per week in the normal course of his employment. This would encourage rather than discourage overtime, and the plain purpose of Congress—*viz.* to deter employers from working their employees overtime—would be frustrated. Such a mischievous fallacy we cannot permit. As was said by the Court in *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754 (at p. 757): "It seems that the construction contended for by defendant to the effect that employer and employee may agree on a regular rate of pay regardless of what compensation the employee actually receives, will permit employers to avoid the obligations imposed by Section 7 and will completely nullify the overtime provisions therein contained." It seems clear that the benefits of the Act were intended to apply to a wider group than those employed at the statutory minimum and therefore the Act ought not to be construed to exclude them from its principal benefits.

Numerous other factors seem to support the conclusion which we have here reached. First, the words of Section 7(a)—to-wit: *"regular rate at which he is employed"*—tend to indicate that it is the actual wage of the particular employee involved rather than the general minimum; otherwise the underscored words would be superfluous if not meaningless. We do not believe the words can be interpreted to mean the minimum required by the Act because the plain language, we think, is not subject to that interpretation when read in its ordinary meaning. Normally the best evidence of Congressional purpose is the language of the law itself.[26] In *Haddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329: (C. P. Berks Co., Pa.), the Court said:

"Nor can it successfully be maintained that by regular rate is intended "minimum rate". If Congress had in-

[26] "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Assn.*, 310 U. S. 534, 543.

[fol. 93] tended the overtime to be paid at one and one-half times the "minimum" legal rate, it could have said so very aptly by using the word 'minimum' instead of the word 'regular'. The fact that it did not do so is a plain indication that it did not so intend."

Similarly, in *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn.), the Court said:

"By the language of the statute, therefore, the one and one-half pay for overtime is one and one-half times the rate at which the particular employee is employed, whatever that may be."

Secondly, Section 18 of the Act, 52 Stat. 1060 (1938), 29 U. S. C. § 218 (Supp. 1939), reinforces the opinions just expressed as to what Congress intended by the words "regular rate" of pay as used in Section 7(a). Section 18 of the Act provides that:

"No provision of this Act shall justify any employer in reducing a *wage paid by him* which is in excess of the applicable minimum wage under this Act. * * *" (Italics supplied.)

By enacting Section 18, Congress intended primarily to discourage the possible tendency that the minimum wage fixed in the Act would become the maximum wage paid by employers. In declaring that no provision of the Act shall justify a reduction of wages, one of the aims of the Act is to prevent lowering of existing rates when they exceed the minimum. Thus, if overtime is to be computed at the minimum rate instead of the "wage paid by him", this obviously tends to reduce the existing wage within the meaning of this Section. If the rate is variable at the whim of the employer, the hour provisions of the Act have no effective sanctions. Section 7(a) and Section 18 must be read together, and a comparison of these two sections points to the conclusion which we have reached.

[fol. 94] Thirdly, both the interpretative bulletins [27] issued

[27] "The Act is clear that it is the employee's regular rate of pay on which time and one-half is based and not any minimum wage set in the Act." See Interpretative Bulletin No. 4, 1940 Wage & Hour Man. 95, 96. In answering ques-

by the Wage and Hour Division and regulations [28] have interpreted "regular rate at which he is employed" to mean the actual rate the employee is receiving and not the statutory minimum. Although such interpretations are by no means binding on the courts, we consider them highly significant. See *United States* v. *American Trucking Assn.*, 310 U. S. 534, 549 [29]; *Jacobs* v. *Peavy Wilson Lumber Co.*, 33 F. Supp. 206, 212; *Haddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40.

Fourthly, the vast majority of the courts have construed "regular rate" of pay to mean the actual pay which the employee is receiving, expressly denying that "regular rate" is synonymous with "minimum rate". *Fleming* v.

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tions at a meeting of the Southern States Industrial Council on Sept. 29, 1938, in Birmingham, Ala., Administrator Andrews first stated that a worker employed on a flat weekly salary might be worked more than 44 hours a week, without increased pay, provided his total earnings were not below the minimum requirements of the law. See 3 Wage Hour Rept. 228. This impromptu remark was quickly retracted and subsequent statements and bulletins from the Administrator are all to the opposite effect. See, e. g., Interpretative Bulletin No. 4 issued on Oct. 21, 1938, before the Act became effective. The subject is discussed in an editorial in the New York Times of Tuesday, October 25, 1938.

[28] Regulations on Records § 516.4, 1940 Wage & Hour Man. 282. The regulation was cited with approval and followed in Emerson v. Mary Lincoln Candies, Inc., 175 Misc. 353, 20 N. Y. S. (2d) 570 (Sup. Ct.). See also Haddad v. Bedkerman Shoe Corp., 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.). In an address by the former General Counsel of the Wage and Hour Division, no mention was made of any possible ambiguity in "regular rate". See Magruder, Administrative Procedure under the Fair Labor Standards Act, 25 A. B. A. J. 688 (1939).

[29] In this case, the Supreme Court said that the Administrator's interpretation was entitled to great weight since it was a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

Carleton Screw Products Co., 37 F. Supp. 754; *Fleming* v. [fol. 95] *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300; *Williams* v. *General Mills*, 39 F. Supp. 849; *Sunshine Mining Co.* v. *Carver*, 4 Wage Hour Rept. 480 (D. Idaho); *St. John* v. *Brown*, 38 F. Supp. 385; *Drake* v. *Hirsch*, 40 F. Supp. 290; *Haddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.); *Wilkenson v. Swift & Co.*, 4 Wage Hour Rept. 305 (N. D. Tex.); *McLendon* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex.); *DuBois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541 (C. A. Ohio), affirming *Floyd* v. *DuBois Soap Co.*, 4 Wage Hour Rept. 77 (C. P. Hamilton Co., Ohio); *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn.); *Angel* v. *Dayton Veneer & Lumber Mills*, 4 Wage Hour Rept. 471 (N. D. Ga.); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275; *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn. Ramsey Co.); *Moss* v. *Postal Telegraph Cable Co.*, 4 Wage Hour Rept. 221 (M. D. Ga.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich. Ingham Co.); *Graves* v. *Armstrong Creamery Co.*, 10 U. S. L. Week 2320 (Sup. Ct. Kan.). In *St. John* v. *Brown*, 38 F. Supp. 385, the Court said (at p. 389):

"The key to the right answer is the true per hour wage of the employee. That must be determined, of course, by reference to the actual employment contract. That amount, whatever it is, represents the true regular rate of pay for each of the hours worked in a week."

The Court also made this significant statement (at p. 389):

"It is not enough that the salaries here, independent of the working contract, may be allocated or spread so as to cover the minimum and one and a half for overtime. It may even exceed the 30 cent minimum and the 45 cents for overtime and yet be a violation of the law."

As we have indicated, those courts which adopt a "minimum wage" theory of Section 7(a) almost inevitably must reach a conclusion different from the conclusion that we have here reached. See *Fleming* v. *A. H. Belo Corp.*, 121 F. [fol. 96] (2d) 207 (C. C. A. 5th, 1941), *cert. granted*, 10 U. S. L. Week 3137; *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90; *Bumpus* v. *Continental Baking Co.*, No. 211, W. D. Tenn., April 29, 1941; *Gurtov* v. *Volk*, 170

Misc. 322, 11 N. Y. S. (2d) 604 (Munic. Ct. N. Y. 1939). Yet surprisingly enough, the Court in the *Belo* case, *supra*, used language which would indicate that the position we have taken is unassailable:

"In cases where there is no express agreement as to the regular rate at which the employee is employed, but only an agreement for a weekly wage, appellant's method of arriving at the regular rate by assuming that the wage stipulated for is not intended to cover overtime worked, would, we think, be unexceptional." *Fleming* v. *A. H. Belo Corp.*, 121 F. (2d) 207, 211.

To be sure, the facts in the *Belo* case are distinguishable from the case at bar. In that case, the plan of the *Dallas News* was to make individual contracts with its reporters guaranteeing them a weekly salary above the statutory minimum. The contract called for, a "basic hourly rate" exceeding the minimum wage prescribed by the Act, with overtime at the rate of one and one-half times this "basic hourly rate", and guaranteed to each employee a predetermined weekly wage. Thus, the formula called for one hourly rate up to forty hours, and a higher rate beyond that; but provided that the employees got the full amount whether or not they worked more than forty hours in any week. Salaries were not reduced, but neither was extra pay given for overtime. The Wage-Hour Division contended that overtime should be calculated on the actual weekly wage. The Court rejected this contention and upheld the wage-payment plan. The case differs from the case at bar because there was a contract for a weekly wage, and also for an hourly "regular rate" not less than the minimum on which overtime should be computed. We find no such written contract in the instant case, and there is no evidence in the record, nor any con-[fol. 97] tention by the defendant, that the parties had agreed upon a rate of pay per hour. That there are important grounds of distinction is admitted by the Court in the *Belo* case in the very language we have quoted. Furthermore, that same Court in a very recent decision, *Warren-Bradshaw Drilling Co.* v. *Hall*, decided Dec. 9, 1941, (10 U. S. Law Week 2368), expressly stated that the written agreement in the *Belo* case was determinative of the issue.

Method of Computation

Although the Act only establishes hourly wage standards, it has been uniformly interpreted as covering salaried workers as well as employees paid on an hourly basis. *E. g., St. John* v. *Brown*, 38 F. Supp. 385; *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300; *In re New Style Hat Mfg. Co., Bankrupt*, 4 Wage Hour Rept. 29 (N. D. Ohio); *Moss* v. *Postal Telegraph-Cable Co.*, 4 Wage Hour Rept. 291 (M. D. Ga.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich.); *Williams* v. *General Mills*, 39 F. Supp. 849 (N. D. Ohio); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 4 Wage Hour Rept. 352 (E. D. Okla.); *Haddad* v. *Beckerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.). Otherwise the Act would be almost completely ineffective in reducing the actual hours worked per person, since the penalty for overtime would be purely nominal and in no sense real. In *Boylan* v. *Linden Mfg. Co., supra*, the Court stated this expressly (at p. 158):

"That the statute was intended by Congress to apply to employees receiving weekly or monthly wages is, I think, reasonably apparent from a consideration of all the provisions of the Act. * * * There would seem to be no satisfactory basis for limiting the scope of the statute to employees working solely on the basis of a specific hourly wage."

Similarly, the mere fact that a worker's hours of em- [fol. 98] ployment fluctuate does not insulate him from the protection of the overtime provisions of the Act. E. g., *St. John* v. *Brown*, 38 F. Supp. 385; *Abadie* v. *Cudahy Packing Co.*, 37 F. Supp. 164; *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn. Ramsey Co.); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 4 Wage Hour Rept. 352 (E. D. Okla.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich.). In *Boylan* v. *Linden Mfg. Co.*, the Court said (at p. 159):

"The record indicates that plaintiff worked a fluctuating number of hours per week during the period of his employment. *This means that the average hourly rate must be computed separately for each week* by dividing the sum of fifty dollars by the number of hours actually worked." (Italics supplied.)

In this connection it should be noticed that the word "regular" as used in the overtime compensation provisions

of the Act referring to the employee's "regular rate" of pay does not necessarily mean unvarying. In *Haddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.) for example, it was argued that a person paid by the week has no "regular" hourly rate; that if in some weeks he works more than in others, his hourly rate would differ each week. This argument was summarily rejected and the Court said (at p. 329):

"We do not think the word 'regular' must necessarily and in all cases mean 'unvarying'. 'Regular' means, in the first place, in accordance with a *regula* or rule. It does not necessarily imply an unvarying sameness. It may mean normal, agreeable to established, customary forms * * * We think a fair interpretation of the word as used is that it means basic or actual hourly pay * * *"

If the employee's hours vary from week to week, the cost per week to his employer will vary accordingly. See *Wilson* v. *New*, 243 U. S. 332, 361-362. There is nothing in the Act which prevents the average hourly rate from being com-[fol. 99] puted separately each week. In fact, the Act contemplates *work-week* as the regular unit for computing the hourly rate.

The Wage and Hour Division has construed "regular rate" of pay to mean the actual hourly rate of pay, computed by dividing the actual weekly wage by the number of hours actually worked. Regulations on Records §516.4, 1940 Wage & Hour Man. 282; Interpretative Bulletin No. 4, 1940 Wage & Hour Man. 95, 96.[30] Where the employee works an irregular or fluctuating number of hours from week to week, his regular rate of pay is to be computed each week by dividing his weekly salary by the number of hours he worked that week. See Interpretative Bulletin No. 4, 1940 Wage & Hour Man. 95, 97. Similarly, a vast majority of the courts agree that the regular rate is to be computed on the basis of wages actually received each week divided by the number of hours worked each week.[31] *St.*

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[30] Similarly, piece work must be translated into hourly rates. See *Wagner* v. *Estate of Abe Field*, 4 Wage Hour Rept. 329 (Sup. Ct. Ind.).

[31] Thus, an employee receiving $40 for a 50 hour week would be deemed to be paid at the rate of 80 cents an hour, and the courts require that his weekly wage be increased to $42.40 ($.80 x 44 plus $1.20 x 6).

John v. *Brown*, 38 F. Supp. 385; *Du Bois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541 (C. A. 1941); *McLendon* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex.); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Sunshine Mining Co.* v. *Carver*, 4 Wage Hour Rept. 480 (D. Idaho); *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn. Ramsey Co.); *Hoddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co.); *Moss* v. *Postal-Telegraph-Cable Co.*, 4 Wage Hour Rept. 221 (M. D. Ga.); *Emerson* v. *Mary Lincoln Candies, Inc.*, 174 Misc. 353, 20 N. Y. S. (2d) 570 (Sup. Ct.); *Angel* v. *Dayton Veneer & Lumber Mills*, 4 Wage Hour Rept. 471 (N. D. Ga.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich., Ingham Co.); *Graves* v. *Armstrong Creamery Co.*, 10 U. S. L. Week 2320 (Sup. Ct. Kan.). In *Hargrave* v. *Mid-*[fol. 100] *Continent Petroleum Corp.*, 4 Wage Hour Rept. 352 (E. D. Okla.), the Court said (at p. 353):—

"* * * their regular wage is to be computed upon the basis of the wages actually received each week divided by the number of hours worked each week. For that number of hours in excess of the maximum, plaintiffs are entitled to be compensated at the rate of one and a half times the regular rate.

"The plaintiffs have not received compensation for overtime at one and a half times their regular rate, but have been paid only at regular rates of pay for all hours they worked during the weeks in question, and each plaintiff is therefore entitled to an additional one-half of his regular rate for each hour of overtime in each of the weeks in question."

In an effort further to clarify the point, we present one example. Let us suppose an employee is employed at a salary of $30 for a workweek of indefinite length. For a week of 50 hours his regular rate of pay would be 60 cents per hour ($30÷50). The employee's total earnings for the week would be $33, computed as follows:

40 hours at 60 cents per hour (straight time)	$24.00
10 hours at 90 cents per hour (time and one-half)	9.00
	$33.00

The following week, his total earnings would be similarly computed and so on each week.

The Liquidated Damages Provision of the Act

One last point remains for our determination, and that involves the interpretation of Section 16(b) of the Act, 52 Stat. 1069 (1938), 29 U. S. C. § 216(b) (Supp. 1939). Section 16(b) provides:

[fol. 101] "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable * * * in the amount of * * * unpaid overtime compensation * * * and in an additional equal amount as liquidated damages."

Is this provision of the law as to liquidated damages mandatory or discretionary? Since the Act has been violated in good faith in this case, we would indeed like to hold that it is discretionary. It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authority in the courts to be subjected to such a measure. Yet no matter how much we lament its harshness, the Section appears to be mandatory and virtually all the courts have so construed it. *St. John* v. *Brown*, 38 F. Supp. 385; *Williams* v. *General Mills*, 39 F. Supp. 849; *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275; *Thompson* v. *Daugherty*, 40 F. Supp. 279; *Emerson* v. *Mary Lincoln Candies, Inc.*, 174 Misc. 353, 20 N. Y. S. (2d) 570 (Sup. Ct.); *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90; *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742; *Lefevers* v. *General Export Iron & Metal Co.*, 36 F. Supp. 838; *Hargrave* v. *Mid-Continent Petroleum Corp.*, 4 Wage Hour Rept. 352 (E. D. Okla.); *Moss* v. *Postal Telegraph Co.*, 4 Wage Hour Rept. 291 (M. D. Ga.); *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn. Ramsey Co.); *Wagner* v. *Estate of Abe Field*, 4 Wage Hour Rept. 392 (Sup. Ct. Ind.); *Roberts* v. *Hoarel*, 4 Labor Cases 60648; *Abroe* v. *Lindsay Bros. Co.*, 4 Wage Hour Rept. 38 (Minn. Sup. Ct.).

The use of the word "wilful" in Section 16(a) defining criminal liability under the Act and its omission in Section 16(b) defining civil liability would seem to indicate that the employer's good faith is immaterial under Section 16(b). The only case we have been able to find which re-

fused to apply Section 16(b) in the case of a 'good faith violation of the Act is *Clour* v. *Jones*, 4 Wage Hour Rep. 353 (E. D. Okla.). While we are extremely sympathetic with the sentiments which prompted the Court to recoil [fols. 102-103] from a mandatory application of the Section in that case, we are unable to agree with the result. Such matters are for Congress and not for the courts. The views we have expressed throughout this opinion are in accord with those expressed by the Circuit Court of Appeals for the Sixth Circuit in the very recent decision of *Bumpus* v. *Continental Baking Co.*, decided Dec. 10, 1941, (10 U. S. Law Week 2369).

For the reasons set forth above, the decision of the lower court is reversed and the case remanded with directions to enter judgment for the plaintiff in accordance with this opinion.

Reversed and Remanded.

[fol. 104] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4867

WILLIAM H. MISSEL, Appellant,

vs.

THE OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., a Body Corporate, Appellee

JUDGMENT—Filed and Entered January 5, 1942

Appeal from the District Court of the United States for the District of Maryland

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Maryland, at Baltimore,

with directions to enter judgment for the plaintiff in accordance with the opinion of the Court filed herein.

Armistead M. Dobie, U. S. Circuit Judge.

January 5, 1942.

January 29, 1942, petition of appellee for a stay of the mandate is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING APPLICATION IN SUPREME COURT FOR A WRIT OF CERTIORARI—Filed January 31, 1942

Upon the Application of the Appellee, by its counsel, John R. Norris and J. Ninian Beall, and for good cause [fol. 105] shown,

It Is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Senior Circuit Judge.

January 30, 1942.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPTS OF RECORDS IN MAKING UP RECORDS FOR USE IN THE SUPREME COURT OF THE UNITED STATES ON APPLICATIONS FOR WRITS OF CERTIORARI—January 9, 1941

For Reasons Appearing To The Court,

It Is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further Ordered that a copy of this order be incorporated in said certified transcripts of records.

John J. Parker, Senior Circuit Judge.

January 9th, 1941.

[fol. 106] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 107] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 16, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is assigned for argument immediately following No. 622.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8972)

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FEB 11 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 939

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,

Petitioner,

VERSUS

WILLIAM H. MISSEL,

Respondent.

PETITION OF OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC. FOR A WRIT OF CERTIORARI TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT OF SAID PETITION FOR A WRIT OF CERTIORARI.

JOHN R. NORRIS,

J. NINIAN BEALL,

Attorneys for Petitioner.

February 7, 1942.

The Daily Record Co. Print, Baltimore.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,

Petitioner,

VERSUS

WILLIAM H. MISSEL,

Respondent.

PETITION OF OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC. FOR A WRIT OF CERTIORARI TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of Overnight Motor Transporation Company, Inc., a corporation organized and doing business under the laws of the State of Maryland, with its principal office at Baltimore, in said State, respectfully presents this application for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Cir-

cuit entered on January 5, 1942, reversing the decision of the United States District Court for the District of Maryland, filed July 28, 1941, and remanding the case with directions to enter judgment for the Plaintiff.

OPINIONS BELOW

The opinion of the District Court overruling Defendant's motion to dismiss (R. 5) is reported in 36 F. Supp. 980, and the opinion granting judgment for Defendant on the merits (R. 27) in 40 F. Supp. 174. The opinion and judgment of the Circuit Court of Appeals (R. 56) is reported in 5 Wage Hour Rept. 25 (C. C. A. 4th, 1-5-42).

STATUTES INVOLVED

The statute which is directly involved in these proceedings is the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 et seq., 29 U. S. C. A. 201 et seq., hereinafter sometimes referred to as the Act. Section 13 (b) (1) of this Act includes reference to the provisions of Section 204 of the Motor Carrier Act, 1935 (now Interstate Commerce Act, Part II), c. 498, 49 Stat. 546 et seq., 49 U. S. C. A. 304, and this latter statute is involved in some of the questions presented. The relevant provisions of these two statutes are set forth in the Appendix.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. 347).

The opinion of the Circuit Court of Appeals for the Fourth Circuit was filed January 5, 1942. Application for

a stay of the mandate pending this application for a writ of certiorari was duly made and on January 30, 1942 an order staying the mandate for thirty days was entered by the Court below in order to enable Petitioner to apply to this Honorable Court to review said judgment of the United States Circuit Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED

(1) Does the Fair Labor Standards Act, through its minimum wage provisions, Section 6, and its maximum hour provisions, Section 7, have the effect of establishing a divided or dual classification or coverage of employees? Section 6 is clearly limited to fixing minimum wages for a large group of low-wage earners. Section 7 clearly increases the income and tends to establish maximum hours for the group of employees covered by Section 6, but, does Section 7 go further and increase earnings and establish maximum hours for all other classes of employees, regardless of salary, need for federal protection, and the national economic changes which vary from time to time?

(2) Does the Act entirely destroy the right of private contract to fix a guaranteed weekly or monthly lump sum compensation which is far in excess of the minimum wage provisions, or does the Act merely limit this right by establishing a minimum wage floor below which the parties may not contract?

(3) Are the penalty provisions of the Act mandatory or discretionary with the courts in view of the good faith litigation of the parties?

(4) Where applicable, the Act is contingent upon certain factual determinations by the Interstate Commerce Commission. Can the obligations finally established be made retroactive, together with penalties?

STATEMENT

The case was tried on complaint, answer, amendment to the complaint, and stipulation of certain facts by the parties. The following are the essential facts (R. 7).

William H. Missel brought this suit under the Fair Labor Standards Act for overtime wages alleged to be due him for hours worked in excess of the maximum number prescribed in Section 7, and for an additional equal amount as liquidated damages as provided in Section 16. He was employed at a regular fixed weekly salary to do a job which necessarily involved irregular, fluctuating periods of work per day, rather than to work on a fixed schedule of hours. In some weeks he worked less than the number fixed in Section 7 and in other weeks considerably in excess of that number. He was paid a uniform salary regardless of whether his duties required short or long hours, and regardless of absent time. He regulated his on-duty hours according to his own judgment as to what was necessary.

He began his employment with Overnight Motor Transporation Company, Inc. on November 26, 1937, prior to the passage of the Act, and from that date until October 31, 1938, he received a salary of $25.50 per week. On the latter date, his salary was increased to $27.50 per week, and he was paid this amount until October 19, 1940 when his employment ceased.

The salary voluntarily agreed upon, paid and accepted as full compensation for his services, at all times, and for

all weeks, was in excess of the statutory minimum wage for straight time, and was in excess of one and one-half times the statutory minimum wage for all overtime worked or on duty.

Petitioner is a common carrier of property in interstate commerce by motor vehicle, and as such is subject to the Interstate Commerce Act, Part II, 49 U. S. C. A. 301, 304.

Respondent's duties were those of a rate clerk, cashier and dispatcher, and all duties were conceded to be "in commerce".

The case concerns the period of approximately two years' employment, from October 24, 1938 to October 19, 1940. Respondent was on duty from a minimum of approximately forty hours per week during slack business to an occasional maximum of approximately seventy-five hours per week during the peak business.

Respondent, after resigning, claimed for the first time that the employment agreement under which he had worked for two years was null and void and in violation of the Act, for the alleged reason that no weekly contract of employment at a fixed salary, regardless of amount, made in advance of the work to be done, can, as a matter of law, comply with both of Sections 6 and 7. This is said to be so because of an assumption that lump sum weekly wages are not constructed upon the mathematical overtime wage formula contemplated by Section 7.

On the assumption that Section 7 cannot be applied without an hourly contract rate under Section 6, it is claimed that the effect of the law is to assign all of the contract salary to a straight time hourly rate in excess of minimum wages, in the alternative (a) for the statutory hours

worked or (b) all of the hours worked, and force the result that no penalty overtime has been paid.

Then the Respondent claims that on the alleged unpaid overtime, determined retroactively as aforesaid, there must be added 100% penalty under Section 16, which Respondent claims is mandatory upon the Court regardless of good faith litigation.

REASONS FOR GRANTING THE WRIT

(1) The primary issue is whether the Fair Labor Standards Act was intended to raise minimum wages of a group of poorly paid employees and also to spread employment among the same group of poorly paid employees; or whether Section 6 of the Act, covering straight time wages, alone had class limitations and Section 7, covering overtime wages, went beyond the class scope of the minimum wage provisions and was intended to spread employment and raise wages among all classes of employees regardless of income.

The Court below erred in assuming that the Act contemplated dual class coverage, limited as to straight time and unlimited as to overtime. The Court also erred in adopting a literal construction of the Act which is at variance with the intent of Congress.

(2) Numerous district courts have divided on the questions presented here and only three circuit courts have passed on any part of the questions which are applicable to interstate industries. When the physical operations of these industries extend beyond the jurisdiction of any one of the judicial circuits, as in this case, these industries are confronted with the conflicting decisions of the district and state courts. The state courts have not consistently

followed either the district courts or the circuit court of the judicial circuit in which the states are located.

This court should take jurisdiction and establish a uniform rule.

(3) This is the only circuit court case presenting the question of a fixed weekly salary as distinguished from an hourly method of pay. In addition, this case presents the question of employment at an agreed stipend for the accomplishment of certain duties which necessarily involve fluctuating and indefinite hours.

The Circuit Court erred in holding that the Act destroyed the private right of contract, instead of construing the Act as having the effect of placing a minimum wage floor below which employer and employee may not contract.

(4) The Circuit Court decision in this case and some of the district court decisions appear to rest on the assumption that where a contract of employment on a weekly basis did not break the wage down on an hourly basis and specify separately the straight time and overtime rates, there is a legal presumption that the total contract wage did not contemplate or include overtime at a penalty rate and was, therefore, in violation of the provisions of Section 7. This theory of construction is in conflict with the usual and ordinary presumptions that the parties contemplate compliance with the law in their over-all contract.

The Court below erred in applying this novel theory of presumptions in wage contracts.

(5) A related issue is whether the double penalty provisions of Section 16 were mandatory upon and not discretionary with the courts, regardless of good faith litigation. The Circuit Court ruled they were mandatory, and

this interpretation deprived Petitioner of the protection of the "due process" provisions of the Constitution.

The Court below erred in this construction of the Act and the ruling is in conflict with numerous decisions of this Court. This is the only circuit court which has ruled upon the penalty provision of this law.

(6) A secondary issue concerns the conflicting jurisdictions created under the Fair Labor Standards Act and the Interstate Commerce Act, Part II. The District Court held that the courts have jurisdiction to determine which employees are exempt under Section 13 of the Fair Labor Standards Act from the overtime penalty wage provisions of Section 7, without the benefit of a prior determination of the facts related to the exemption provisions by a uniform ruling of the Interstate Commerce Commission. This question involves transportation and was committed to the Commission's jurisdiction under Section 204 of the Interstate Commerce Act, Part II.

The District Court erred in overruling Petitioner's motion to dismiss because the Commission had not, at that time, acted. This ruling was contrary to the decisions of this Court.

On final hearing, both the District and Circuit Courts erred in failing to appreciate the legislative function of the Commission as implementing the Fair Labor Standards Act, to the end that as to overtime penalty wages, that law spoke only from the date of the factual determination by the Commission and could not create retroactive liabilities and penalties as to the particular classes of employees involved. This is the only appellate court case involving this issue.

This ruling is contrary to the long-established procedure which Congress has adopted in similar cases and which has been accepted and followed without question.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

JOHN R. NORRIS,

J. NINIAN BEALL,
Attorneys for Petitioner.

February 7, 1942.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

HISTORY OF THIS LITIGATION

This case comes before the Court following a series of legal and administrative proceedings which were necessary for the purpose of determining whether Section 7, the mixmum-hour provisions of the Fair Labor Standards Act, was applicable to Petitioner and Respondent under any circumstances, and subsequently, proceedings were held for the purpose of determining under what circumstances the parties might be subject to the Act.

By way of explanation of the prior proceedings, attention is called to certain exemptions in Section 13(b) of the Act. That Section exempts from the maximum-hour provisions of Section 7, "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (now referred to as the Interstate Commerce Act, Part II)".

Petitioner believed that the Interstate Commerce Commission had power to prescribe qualifications and maximum hours of service for all employees of common and contract carriers under the provisions of paragraphs (1) and (2) of Section 204, and that the Commission's jurisdiction was limited under paragraph (3) of the same Section to private carrier employees whose duties affected safety. That question reached this Court in the case of *United States v. American Trucking Associations, Inc.*, 310 U. S. 534 (May 27, 1940), in which this Court held, by a 5-to-4 decision, that there was no distinction in the

Commission's jurisdiction as between for-hire and private carriers and that the Commission's jurisdiction was limited to employees whose duties affected safety. A petition for re-hearing was denied by this Court on October 14, 1940, 311 U. S. 724.

Following this decision, the Interstate Commerce Commission instituted an investigation to determine which employees had duties affecting safety, and that proceeding before the Commission was known as Ex Parte MC-2 and MC-3, decided March 4, 1941, and reported in 28 M. C. C. 125.

Respondent instituted this suit on October 29, 1940, which, it will be observed, was prior to the determination by the Commission of the question as to whether the duties of a dispatcher affected safety. Petitioner moved to dismiss the suit on the ground that the Interstate Commerce Commission alone had the power to make a factual determination because of the necessity for uniform application throughout the country, and as the proceedings before the Commission had not been completed, Respondent's action was premature.

The District Court overruled the motion for dismissal on February 20, 1941, *Missel v. Overnight Motor Transportation Company, Inc.*, 36 F. Supp. 980. After certain pretrial conferences and agreements with respect to stipulations, the case was argued on its merits before the District Court on April 24, 1941, and was decided July 28, 1941, 40 F. Supp. 174.

It is to be noted that between the date of the decision denying the motion to dismiss on February 20, 1941, and date of hearing on the merits, April 24, 1941, the Commission rendered its decision on March 4, 1941, determining

the status of employees such as Respondent, which fact rendered moot the question as to the jurisdiction of the Court to determine the status of Respondent in advance of a determination by the Commission. However, the date of the Commission's determination remained of great importance because there was presented the question as to whether this factual determination and the legislative proceedings by the Commission spoke for the future or could possibly have the effect of creating retroactive liabilities and penalties under the Fair Labor Standards Act.

Petitioner contended before the Courts below that the overtime penalty wage provisions could not apply to Respondent retroactively from the date of the Commission's factual determination of his status, and Petitioner further contended that the compensation paid Respondent fully complied with the requirements of the Fair Labor Standards Act, even if the overtime wage provisions of Section 7 applied to Respondent.

Both of these contentions were rejected by the Circuit Court. The opinion deals at length with the construction of the terms of Section 7, and while the Circuit Court does not, in the opinion, mention the question as to the effective date of Section 7 to an employee such as Respondent, the Circuit Court did remand the case to the District Court with instructions to enter judgment in accordance with the opinion, and there would seem to be the implication that Petitioner was held liable retroactively because Respondent was not employed by Petitioner at any time subsequent to the determination of the status question by the Interstate Commerce Commission. These significant dates were brought to the attention of the Circuit Court.

CONSTRUCTION OF SECTION 7—MAXIMUM HOURS

Under varying facts and circumstances, a number of district and state courts have taken the view that the Fair Labor Standards Act was a minimum wage law which placed a floor below which employer and employee could not go in their wage contractual relations, and that the Act did not otherwise impair the right of contract, for Section 7 had no application to highly paid employees beyond the classes covered by Section 6.

Fleming v. A. H. Belo (C. C. A. 5th, 1941), 121 F. (2d) 207;
Fleming v. Atlantic Co., 40 F. Supp. 654;
Fleming v. Stone, 41 F. Supp. 1000;
Gurtov v. Volk, 11 N. Y. S. (2d) 604;
Reeves v. Howard County Refining Co., 33 F. Supp. 90;
Schlee v. Lincoln Oil Co. (C. C. Wayne Co., Mich., 12/31/41), 5 Wage Hour Rept. 72;
Warren-Bradshaw Drilling Co. v. Hall, (C. C. A. 5th, 12/9/41), 4 Wage Hour Rept. 695;
Woods v. Wilkerson, 40 F. Supp. 131.

Numerous district and state courts have reached a different conclusion and held that Section 7 required the payment of penalty wages for all classes of employees regardless of salary, and with respect to salaried employees paid on a weekly or monthly basis it had the further effect of reforming the contracts by establishing straight time hourly rates in excess of the statutory provisions of Section 6. The principal cases are:

Bumpus v. Continental Baking Co. (C. C. A. 6th, 12/10/41), 4 Wage Hour Rept., 692;
Dubois Soap Co. v. Floyd (C. A. Ohio, 9/15/41), 4 Wage Hour Rept. 541;

Fleming v. Carleton Screw Products Co., 37 F. Supp. 754;
Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300;
Haddad v. Beckerman Shoe Corp. (C. P. Berks Co., Pa. 5/5/41), 4 Wage Hour Rept. 329;
McLendon v. Bewley Mills (N. D. Tex. 12/10/40), 4 Wage Hour Rept. 30;
Muldowney v. Seaberg Elevator Co., 39 F. Supp. 275;
St. John v. Brown, 38 F. Supp. 385;
Williams v. General Mills, 39 F. Supp. 849.

The cases just above recited hold that the "regular rate of pay" is determined by dividing the total number of hours worked in any workweek into the total sum of wages paid. In two recent decisions, a new method of computation has been evolved to determine this mathematical "regular rate", viz.: division of the statutory number of hours provided in Section 7 into the total sum of wages paid.

Allen v. Moe (D. C., Idaho, 12/10/41), 5 Wage Hour Rept. 71;
McClure v. Schulze Baking Co. (C. C. Winnebago Co., Ill., 11/21/41), 5 Wage Hour Rept. 53.

Three Circuit Courts have passed on some phases of the questions. The general tenor of these Circuit Court decisions has been to extend the coverage of the Act, through Section 7 (maximum hours), to classes of employees not covered by Section 6 (minimum wages). It does not seem possible to reconcile the statements of the Circuit Courts with respect to the private right of contract for compensation in excess of minimum wages, and the actual effect of the decisions as applied to cases involving weekly or

monthly wage contracts exceeding the minimum provisions.

Bumpus v. Continental Baking Co. (C. C. A. 6th, 12/10/41), 4 Wage Hour Rept., 692;
Fleming v. A. H. Belo (C. C. A. 5th), 121 F. (2d) 207;
Missel v. Overnight Motor Transporation Co., Inc. (C. C. A. 4th, 1/5/42), 5 Wage Hour Rept. 25;
Warren-Bradshaw Drilling Co. v. Hall (C. C. A. 5th, 12/9/41), 4 Wage Hour Rept. 695.

The Circuit Court of Appeals for the First Circuit, in the case of *Bowie, et al v. Gonzalez, et al.*, 117 F. (2d) 11, at page 18, stated that the Congressional purpose was to raise the wage level of workers in the lowest pay brackets, and through the fixing of a universal minimum wage, to cure and eliminate "the evils of sweat-shop conditions of long hours indoors at low wages."

In the case of *United States v. Darby Lumber Company*, 312 U. S. 100, 125, in which the constitutionality of this Act was in issue, there are expressions which indicate that this Court has considered the Act as being a minimum wage law for the protection of the large group of poorly paid employees, and that the Act did not go beyond that purpose. "Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed."

The provisions of the Act as a whole, and particularly the provisions of Section 6 and Section 8 which so strictly limit its coverage with respect to straight time wages, are sufficient in themselves to challenge any interpretation of

Section 7 which would extend its coverage to all classes of employees regardless of salary. The decisions of this Court are numerous and clear that the primary rule of construction is to determine the intent of Congress and reference to the legislative history of this Act strongly supports the proposition that Congress did not intend to enlarge the class coverage under Section 7 beyond the provisions of Section 6.

It requires but slight familiarity with the legislative history of this Act, which was highly controversial when passed, to conclude that it could not have been passed had Congress suspected that the provisions of Section 7 would would be construed to cover all classes of employees, regardless of salary. The committee reports make it clear that there was no thought on the part of Congress to completely deal with the matter of wages and hours for all employees, but that the purpose of the Act was to make a beginning by extending the arm of federal protection only to that large group of poorly paid employees which obviously were in need of some protection. We presume that it would be more appropriate to offer citations in support of these observations in the trial brief rather than in connection with this petition for writ of certiorari.

RIGHT OF CONTRACT

In this case there are no disputes with respect to the terms of the employment contract, the essential features of which were covered by Stipulation (R. 17). Respondent was employed by Petitioner prior to the passage of the Act and for two years subsequent thereto. He was always employed by the week at a weekly salary. He was the office man at a small truck terminal where the volume of business varied from day to day, week to week, and according to the seasons of the year and change in business

conditions. There was never enough business for an around-the-clock office set-up. During slack periods, the on-duty hours would be as low as 40, possibly less, and during periods of unusual activity, he would have to look after matters which involved being on duty or responsible for results, for as much as 75 hours.

In a limited sense, he was in charge because there was no one present at all times to direct his activities. He knew when the trucks were expected to come and expected to go, and he adjusted his on-duty hours, or presence at the terminal, according to his judgment as to the necessities of the occasion. These were the facts which led to his employment to do a job, as distinguished from employment by the hour or for a particular number of hours per week.

He was entitled to some vacation with pay, and if he was sick or had any other occasion to be absent for reasonable periods, no deductions were made from his salary. In many respects, he might be considered as a minor executive or administrative employee of the kind exempt under Section 13(a) of the Act. But the Administrator was given the power to define administrative and executive employees and under the Administrator's definitions, from time to time, there may be some doubt whether he can be qualified as an executive or administrative employee, because he did a certain amount of detailed work which was not of a strictly administrative or executive nature.

During the two years that the Act was in effect, Respondent never questioned his employment arrangement. The first notice Petitioner had of any claim was this suit which was filed after the employee had resigned to take a better place with another company. The opinions of the Courts below disclose that even when the suit was filed, the employee did not have in mind a definite claim or contention

with respect to any unpaid wages. The bill of complaint, as amended, was in the alternative, on the theory that there might be some possible constructions of the Act which could, in some way, result in a recovery. It was stipulated, by way of illustrating the legal question, that the maximum number of hours for any week or two during the two years he worked after the Act became effective, would be about 75 hours. This was done for an assumed maximum week in order to test the theory of the case.

The contract as it was understood and applied by the parties:

Rate—$27.50 per week.

Short week example: Workweek—slack period—40 hours x 30¢ per hour, minimum wage under Sec. 6 = $12.00 per week. Employer paid additional $15.50 in cash in excess of minimum and gave vacation and sick leave with pay. Consideration for excess payments—availability of trained employee's service for both slack and peak business periods.

Long week example: Workweek of 75 hours at 30¢ per hour under Sec. 6 = $22.50, assuming that Sec. 7 is not applicable because of the exemption in Sec. 13(b).

If Sec. 7 were applicable to Respondent, the agreement would cover a workweek of approximately 75 hours, as follows: 30¢ for 42 hours = $12.60, plus 33 hours at 45¢ = $14.85, or $27.45 per week.

Respondent now says that the contract which the parties made and performed under for two years was null and void by reason of the Fair Labor Standards Act, and that instead of $27.50 per week being compensation for the job and the hours worked, it covered only the statutory work-

week of 42 hours. He claims that his pay is $0.655 per hour ($27.50 divided by 42 hours), or more than twice the minimum wage covered by law, and then demands more money for overtime at penalty rates.

Applying this theory to a workweek of 75 hours, Respondent claims 42 hours at $0.655, or $27.50, plus 33 more hours at one and one-half times $0.655 or $0.982 per hour, or $32.40. He adds the sum of $32.40 to the $27.50 per week which was paid, making a total of $59.90 per week, and then claims an additional penalty of $32.40 per week, making a total of $92.30 per week. To this total is added attorney's fees and costs.

Respondent now says, as one of his alternative claims, that instead of $27.50 per week being compensation for the job and the hours worked, the payment covered only straight time pay for these hours of work, and that no penalty wage, required by law, was paid for the overtime hours. The Circuit Court adopted this latter view.

For straight time and overtime, this employee was always paid in excess of the wage prescribed by the Act, and during the short weeks he received greatly in excess of the hourly rates fixed under the Act. It is said, by the Administrator, that an employer may not average the compensation given an employee over more than one week, and even if that be so, in this case, Petitioner contends that the law was fully complied with for every week computed separately.

There is nothing in the Act which appears to prevent the making of wage contracts on a lump sum basis. However, the Circuit Court decided that if a man is employed by the week, at a flat weekly salary, the employer at the end

of the week must divide the total number of hours worked into the total compensation paid, thereby determining for the first time his straight time pay. Thereupon, the employer is necessarily further indebted to the employee for the overtime hours at one and one-half times the straight time wage so determined. This ruling prohibits a weekly or monthly salary agreement with any kind of an employee subject to the Act, to cover indefinite hours, even though the lump sum salary exceeds straight time minimum wages under Section 6 and overtime wages measured by Section 6 standards.

This construction given the Act has a two-fold effect. It not only extends the coverage of the Act to classes of employees above the minimum wage classes and compels the payment of overtime at penalty rates on wages far in excess of minimum wages, but it has the further effect of reforming contracts so as to establish straight time wages in excess of those fixed by Section 6. For example:

If the employee was paid $27.50 per week and worked 50 hours, his straight time hourly rate would be determined by dividing 50 hours into $27.50, which produces $0.55 per hour or 83% in excess of the maximum straight time rate prescribed under Section 6. Nevertheless, the employer would still owe the employee the penalty rate under Section 7 for 10 hours to the extent of an additional 50% of this so-determined straight time rate.

So, we not only have the question as to whether Section 7 covers employees in the high-salaried brackets, but we have the further result that the straight time wages are raised far in excess of the limitations placed in the Act by both Sections 6 and 8.

This statement of the problem is probably sufficient to acquaint the Court with the importance of the case and the necessity for a determination of these issues, which are obviously of great national interest. Other questions involving conflicting advice and rulings by the Administrator, and compliance with the Federal Registry Act, 44 U. S. C. A. 301, et seq., we feel, may more appropriately be left for the trial brief.

PENALTIES UNDER THE ACT

Section 16 of the Act covers penalties. Section 16(a) deals with penalties which may be inflicted by the sovereign and Section 16(b) covers penalties which may be recovered by employees. It will be observed that if the sovereign inflicts the penalties, the violation must be wilful, although the limitation of "wilful" was omitted from Section 16(b).

The theory of penalties usually contemplates a public purpose rather than a private purpose. Whether some public purpose is to be served by limiting the sovereign's right to inflict penalties where the violations were wilful and not so limited when the penalty is inflicted by a private suit, would seem to be open to question.

Comparing the penalty provisions of the Fair Labor Standards Act with those of numerous other acts which have come before this Court, it does not appear that there is any difference in the discretionary powers of the Court when parties have, in good faith, sought to have their rights and liabilities determined.

It is difficult to see how there could be any difference, in view of the numerous clear and positive expressions of this Court with reference to the "due process" provisions

of the Constitution. While a full discussion of the decisions may appropriately be left for trial brief, the comment of a federal court in considering the penalty provisions of the Gold Reserve Act, clearly states the law as laid down by this Court in numerous cases: "Though defendants should not prevail in such a suit, proceedings instituted in good faith to test rights have never, to our knowledge, been followed by the imposition of penalties, fines, or imprisonment." *Uebersee Finanz-Korporation, etc. v. Rosen*, 83 F. (2d) 225 (1936).

This has been the uniform ruling of this Court and the lower courts involving numerous other acts in numerous cases. Among the more important acts is the so-called "Seamen's Act," 46 U. S. C. A. 596, which prescribed certain penalties for withholding wages. This penalty question was passed upon in a great number of cases, some of which are:

Franco, et al. v. Seas Shipping Corp., 272 Fed. 542 (D. C., Md., 1921);
Meyer v. Dollar S. S. Line, 43 F. (2d) 425 (D. C., Wash., 1930);
O'Hara, et al. v. Luckenbach S. S. Co., 16 F. (2d) 681 (C. C. A., 1926);
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The Cubadist, 252 Fed. 658 (D. C., Ala., 1918).

The provisions of the Federal Trade Commission Act with respect to penalties were passed on in *Federal Trade Commission v. Millers National Federation*, 23 F. (2d) 968 (1927).

Numerous state acts involving penalties have been reviewed by this Court:

Chesapeake & Ohio Ry. Co. v. Conley, 230 U. S. 513 (1912);
Ex Parte Young, 209 U. S. 123 (1908);
Oklahoma Operating Co. v. Love, et al., 252 U. S. 331 (1920);
St. Louis, Iron Mountain & S. Ry. Co. v. Williams, et al., 251 U. S. 63 (1919);
Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651 (1915).

In all of these cases, it was held that the infliction of penalties during the period of good faith litigation would be in conflict with the "due process" provisions of the Constitution.

In the case of *The Sunshine Anthracite Coal Co. v. Homer M. Adkins*, 310 U. S. 381 (1940), this Court continued the protection of a good faith litigant to the time of denial of petition for re-hearing.

The ruling of the Court below which inflicted penalties to be recovered by a private party, retroactively and during the period of good faith litigation, is believed to be in the teeth of the established law governing the question.

It might be added that the good faith of Petitioner in litigating these issues has never been questioned; the Circuit Court had this to say: "It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authorities in the courts, to be subjected to such a measure." However, that Court made no effort to distinguish the Fair Labor Standards Act from the other acts in connection with which this Court has held that penalties could not be inflicted during good faith litigation. The fact that this Court divided 5 to 4 on one of the controlling issues in this case—whether penalty wage provisions of the Act applied to the motor carrier industry

at all—is clearly indicative of the *bona fides* of the litigation. *United States v. American Trucking Associations, Inc.*, 310 U. S. 534.

DUAL FUNCTIONS OF THE ADMINISTRATOR AND THE INTERSTATE COMMERCE COMMISSION

Section 13(b) of the Fair Labor Standards Act exempts certain transportation employees from the overtime wage provisions of Section 7. The Interstate Commerce Commission is charged with the duty of determining which employees have duties affecting safety, and this fact, in turn, establishes the non-coverage of Section 7 as to transportation employees.

The Commission's jurisdiction is broader than the mere matter of hours, because it also is required to establish qualifications of employees.

We take the view that action by the Commission is necessary to implement the Fair Labor Standards Act as to transportation employees. Congress well understood the necessity for uniform treatment of transportation matters involving interstate commerce and knew that the Commission and not the Administrator was the proper body to make these determinations. The Commission fixes rates, determines the income of the carriers, and necessarily must lead and not follow in cases of this kind. The Commission conducted an exhaustive investigation which required time before it determined which employees were engaged in duties affecting safety. Petitioner contended that the determination by the Commission fixed the date for the application of Section 7 of the Fair Labor Standards Act. The Courts below ignored these questions in the opinions although they were presented and argued.

In delegating to the Interstate Commerce Commission jurisdition to make the necessary determinations, which

in turn affects the coverage of the Act, Congress merely followed a long-established procedure under numerous Railroad Labor Acts. The coverage in these statutes was contingent upon a determination by the Commission of classes of railroads, such as the distinction between steam roads and interurban lines, etc. These laws were mandatory upon the carriers, but they were not effective in doubtful cases until they were implemented by findings by the Interstate Commerce Commission. After the findings were made, they spoke for the future with respect to the status of carriers, but, in no cases have such findings been made retroactive.

In a number of cases involving the construction of statutes administered by the Interstate Commerce Commission, this Court has held that the necessity for uniform rulings was an essential part of the scheme of regulation of interstate transportation and such uniformity can only be established by the Commission and cannot be established by the courts.

Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285;
Mitchell Coal & Coke Co. v. Pennsylvania R. R., 230 U. S. 247;
Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

It is unfortunate that in this case the Courts below did not discuss the question, because insofar as Petitioner is concerned, it is of vital importance.

The Administrator has taken the view that all employees subject to this dual jurisdiction are subject to the Fair Labor Standards Act until the Commission has acted; in other words, his view is that the function of the Commission is to determine an exemption to be applicable from the date of determination rather than to implement the application of the law for the future. This view, we think,

would be inconsistent with the duties of the Commission in its regulatory power over transportation agencies and is certainly in conflict with the decisions of the district courts which have had occasion to consider the matter in connection with this Act.

Bechtel v. Stillwater Milling Co., 33 F. Supp. 1010;

Faulkner v. Little Rock Furn. Mfg. Co., 32 F. Supp. 590;

Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 964;

Gibson v. Wilson (D. C., Tenn., 3/20/41), 4 Wage Hour Rept., 259;

Tinerella v. Des Moines Transp. Co., 41 F. Supp. 798;

West v. Smoky Mountains Stages, Inc., 40 F. Supp. 296.

CONCLUSION

The issues involve questions of national economics of far-reaching importance, with particular reference to transportation. Congress has given recognition to transportation problems in the numerous exemptions contained in Section 13. The decision of the Circuit Court would greatly impair the operating efficiency of transportation agencies if they be unnecessarily subjected to penalty overtime wages under rigid rules which may be appropriate for fixed plant operations.

Direct labor costs represent 50% of the operating expenses of common carriers by motor vehicle and the margin between operating expenses and gross income averages 3% for the nation. The undetermined potential increase in labor costs depending upon the final determination of the questions presented here, exceeds the present and past operating margin under the rates published with the Interstate Commerce Commission. The potential cumulative

retroactive wage claims, together with statutory penalties, if applied during the period of more than two years of uncertainty and conflicting decisions, equal a substantial portion of the assets of the industry as a whole and exceed the assets of a great many individual carriers. The speedy determination of the questions is necessary in connection with the solvency of the industry.

Numerous labor contracts with the American Federation of Labor are at variance with the interpretations placed on the Act by the Wage-Hour Administrator and some of the courts, and the industry is unable voluntarily to reconcile the conflicting views.

If this petition be granted it is the purpose of Petitioner to move for an advancement of the hearing on this case to the date which will be fixed for argument in other cases involving the Act which are now before the Court. It is believed that the facts and rulings in this case may be helpful to the Court in considering the questions in their practical application.

Wherefore, it is respectfully submitted that the wide conflict now existing among decisions of numerous state and federal courts will not be reconciled until the opinion of this Honorable Court has been rendered, and that therefore this Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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February 7, 1942.

APPENDIX

STATUTORY PROVISIONS.

The pertinent statutory provisions are as follows:

FAIR LABOR STANDARDS ACT of 1938, c. 676, 52 Stat. 1060 et seq., 29 U. S. C. A. 201, et seq.:

"Finding and Declaration of Policy

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

* * * * * * *

"Minimum Wages

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the

production of goods for commerce wages at the following *rates*[1]—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour,

"(2) during the next six years from such date, not less than 30 cents an hour,

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the *rate* (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under Section 8, whichever is lower, and

"(4) at any time after the effective date of this section, not less than the *rate* (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8."

* * * * * *

"Maximum Hours

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a *rate* not less than one and one-half times the regular *rate* at which he is employed."

* * * * * *

[1] Italics inserted.

"Wage Orders

"Sec. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum *rate* or *rates* of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage *rate* or *rates* to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage *rates* for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

"(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage *rate* (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage *rate* which

the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage *rates* for such classifications, no classification shall be made, and no minimum wage *rate* shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

"(1) competitive conditions as affected by transportation, living, and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry."

* * * * * *

"Exemptions

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); . . ."

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act."

* * * * * *

"Penalties

"Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

* * * * * *

INTERSTATE COMMERCE ACT, PART II (formerly Motor Carrier Act, 1935), c. 498, 49 Stat. 546 et seq., 49 U. S. C. A. 301, et seq.:

"General Duties and Powers of the Commission

"Sec. 204. (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.[2]

[2] Subsection (2) contains similar provision as to contract carriers.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of Sections 204(c); 205; 220; 221; 222(a), (b), (d), (f), and (g); and 224."

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 939.

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,

Petitioner,

VERSUS

WILLIAM H. MISSEL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

JOHN R. NORRIS,
J. NINIAN BEALL,
Attorneys for Petitioner.

March 9, 1942.

The Daily Record Co. Print, Baltimore.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 939.

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,

Petitioner,

VERSUS

WILLIAM H. MISSEL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the District Court overruling Petitioner's motion to dismiss, filed February 20, 1941, is reported in 36 F. Supp. 980 (R. 5-15). Thereupon Petitioner filed answer to the bill of complaint exhibited against it, and the decision of the District Court granting judgment for Petitioner on the merits, filed July 28, 1941, is reported in 40 F. Supp. 174 (R. 27-44).

The Circuit Court of Appeals for the Fourth Circuit reversed the decision of the District Court in an opinion and judgment filed on January 5, 1942, reported in 5 Wage Hour Rept. 25 (R. 56-79).

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. 347).

Petition for a stay of the mandate of the Circuit Court pending application for review of its judgment was duly made and allowed (R. 79). On February 16, 1942 this Honorable Court granted the writ of certiorari for which Petitioner had applied.

STATEMENT OF THE CASE.

This action arises under the Fair Labor Standards Act of 1938, c. 676, Sec. 1 et seq., 52 Stat. 1060, 29 U. S. C. A. Secs. 201 to 219, inclusive, hereinafter sometimes referred to as the Act. Section 13 (b) (1) of this Act contains certain exemptions therefrom as to persons subject to the provisions of Section 204 of the Motor Carrier Act, 1935, (now Interstate Commerce Act, Part II) c. 498, Sec. 1 et seq., 49 Stat. 546, 49 U. S. C. A. 304, and this latter statute is involved in some of the questions presented. The relevant provisions of these two statutes are set forth in the Appendix (pp. 61-66).

The case was tried on complaint, answer, amendment to the complaint, and stipulation of certain facts by the parties. The following are the essential facts (R. 17-18, 28-29).

William H. Missel brought this suit under the Fair Labor Standards Act for overtime wages alleged to be due him

for hours worked in excess of the maximum number prescribed in Section 7, and for an additional equal amount as liquidated damages as provided in Section 16.

He was employed at a regular fixed weekly salary to do a job which necessarily involved irregular, fluctuating periods of work from day to day, rather than to work on a fixed schedule of hours for the day or week. In some weeks he worked less than the number fixed in Section 7 and in other weeks considerably in excess of that number. He was paid a uniform salary regardless of whether his duties required short or long hours, and regardless of absent time. He regulated his on-duty hours according to his own judgment as to what was necessary.

He began his employment with Overnight Motor Transportation Company, Inc., on November 26, 1937, prior to the passage of the Act, and from that date until October 31, 1938, he received $23 per week plus $2.50 cash allowance for supper money, or a total of $25.50 per week. On the latter date, his earnings were increased to $25 per week plus $2.50 allowance, or a total of $27.50 per week, and he was paid this amount until October 19, 1940, when he resigned. It was conceded that the cash supper money allowance is properly to be treated as part of Respondent's wages in interpreting his rights under the Act (R. 28).

The contract of employment was not evidenced by any writing. Respondent's workweek ended on Thursday.

The salary voluntarily agreed upon, paid and accepted as full compensation for his services, at all times, and for all weeks, was in excess of the statutory minimum wage for straight time, and was in excess of one and one-half times the statutory minimum wage for all overtime worked or on duty.

Petitioner is a common carrier of property in interstate commerce by motor vehicle, and as such is subject to the Interstate Commerce Act, Part II, 49 U. S. C. A. 301, 304.

Respondent's duties were those of a rate clerk, cashier and dispatcher, and all duties were conceded to be "in commerce".

The case concerns the period of approximately two years' employment, from October 24, 1938 to October 19, 1940. Respondent was on duty from a minimum of approximately forty hours per week during slack business to an occasional maximum of approximately seventy-five hours per week during the peak business.

For the purpose of presenting a definite factual problem to the District Court it was stipulated that in at least each of two workweeks during the period October 24, 1938 to October 23, 1939,[1] he was on duty as long as 80 hours, and in at least each of three workweeks during the period from October 24, 1939 until he left the company, namely, October 19, 1940,[2] he was on duty as long as 75 hours. These facts served to illustrate the extreme maximum contention of Respondent and made possible the testing of the employment arrangement against the longest possible workweek involved. The average workweek during the two-year period was considerably less than 65 hours (R. 28).

Respondent, after resigning, claimed for the first time that the employment agreement under which he had

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[1] From October 24, 1938 to October 23, 1939, Section 6 of the Fair Labor Standards Act required the payment of a minimum straight time wage of 25¢ per hour for a workweek of 44 hours, as provided by Section 7 (a) (1).

[2] From October 24, 1939 to October 23, 1940, Section 6 of the Fair Labor Standards Act required the payment of a minimum straight wage of 30¢ per hour for a workweek of 42 hours, as provided by Section 7 (a) (2).

worked for two years was null and void and in violation of the Act, for the alleged reason that no weekly contract of employment at a fixed salary, regardless of amount, made in advance of the work to be done, can, as a matter of law, comply with both of Sections 6 and 7. This contention is based on the assumption that lump sum weekly wages are not constructed upon the mathematical overtime wage formula contemplated by Section 7.

On the assumption that Section 7 cannot be applied without an hourly contract rate under Section 6, Respondent claims that the effect of the law is to assign all of the contract salary to a straight time hourly rate, even though the resulting rate is in excess of the statutory minimum wages. The allocation of the contract wage contended for by Respondent is in the alternative (a) for the statutory hours worked or (b) for all of the hours worked. The foundation for Respondent's claim under either theory involves reformation of the contract of employment and is based on forcing the straight time wage above the minimum prescribed by Section 6 and thereby force the result that overtime has not been paid in accordance with Section 7.

Then the Respondent claims that on the alleged unpaid overtime, determined retroactively as aforesaid, there must be added 100% penalty under Section 16, which Respondent claims is mandatory upon the Court regardless of good faith litigation and the "due process" provisions of the Constitution.

Respondent further claims that irrespective of the exemption provision of Section 13 (b), Section 7 is applicable to motor carrier employees retroactively and without regard to date of determination of employees' status by the Interstate Commerce Commission.

SPECIFICATION OF ERRORS.

I.

The Court below erred in holding that the scope of Section 7 (maximum hours) was unlimited, and was not restricted to the classes of employees covered by Section 6 (minimum wages).

The Court also erred in adopting a construction of the Act which is at variance with the intent of Congress.

II.

The Court below erred in holding that the Act destroyed the private right of contract, instead of construing the Act as having the effect of placing a minimum wage floor below which employer and employee may not contract.

The Court also erred in applying a novel legal presumption that the total contract wage was not intended to and did not include overtime pay at a penalty rate, thereby rejecting the usual and ordinary presumption that parties contemplate compliance with the law in their over-all contract.

III.

The Court below erred in ruling that the double penalty provisions in Section 16 were mandatory upon and not discretionary with the courts. The Court also erred in disregarding Petitioner's contention that the overtime rates provided by Section 7 were in the nature of a penalty. The imposition of these penalties, regardless of the fact of good faith litigation, deprived Petitioner of the protection of the "due process" provisions of the Constitution.

IV.

The Court below erred in failing to determine the issues which were duly raised in the pleadings, and argued, with respect to the legislative function imposed by the Act upon

the Interstate Commerce Commission for the purpose of implementing the scope of Section 7, and in ignoring the fact that during the period involved in this suit the prerequisite determination by the Commission under the primary-jurisdiction rule had not been made.

SUMMARY OF ARGUMENT.

1. The Fair Labor Standards Act by Section 6 was intended to raise minimum wages of that class of employees who are within the lowest-pay brackets, and through Section 7 to establish minimum overtime wages for the same class of employees covered by Section 6. The result of the provisions of Section 7 is a tendency to spread employment among the same class of persons protected by Section 6. It was not intended by Congress that the scope of the Act would be restricted by Section 6 to a particular class of employees with respect to the straight time provisions, but would be unrestricted and apply without limitation by Section 7 to all classes of employees with respect to the overtime provisions.

Bourie, et al., v. Gonzales, et al., 117 F. (2d) 11;
Gurtov v. Volk, 11 N. Y. S. (2d) 604;
Reeves v. Howard County Refining Co., 33 F. Supp. 90;
U. S. v. F. W. Darby Lumber Co., 312 U. S. 100;

See also:

83 Congressional Record 7280, 7283, 7304, 7323, 8428, 9177, 9250, 9251, 9252, 9254, 9256.

2. The Act does not destroy the private right of contract but merely places a minimum wage floor below which employer and employee may not go in their wage agreement. Section 7 has no application to employees paid in excess of this minimum wage requirement, for they are beyond the classes comprehended by the Act in Section 6.

Respondent in this case was of this unaffected class. It is to be presumed that in the agreement between him and the Petitioner the parties contemplated compliance with the law in their over-all contract and that it therefore was intended to and did include overtime pay at a penalty rate. The facts in this case clearly disclose that full compliance with the Act was well within a reasonable construction of the contract.

Fleming v. A. H. Belo Corp., 121 F. (2d) 207;
Fleming v. Stone, et al., 41 F. Supp. 1000;
Schlee v. Lincoln Oil Co. (C. C. Wayne Co., Mich., 12/31/41), 5 Wage Hour Rept. 72;
Woods v. Wilkerson, 40 F. Supp. 131.

3. This Court has uniformly held that it would be a violation of the "due process" provisions of the Constitution to deprive parties of access to the courts through the infliction of penalties during the period of good faith litigation. The language of the Act is similar to that of other federal and state laws which impose penalties for violation, but it has never been considered under these statutes that the imposition of penalties was mandatory upon the courts. The provisions of Section 16 and Section 7 are penalties, and it is discretionary with the Court whether they are to be imposed in this case.

Ex parte Young, 209 U. S. 123;
O'Hara, et al., v. Luckenbach S. S. Co., 16 F. (2d) 681;
Chicago S. S. & S. B. R. R. v. Fleming, 109 F. (2d) 419;
Uebersee Finanz-Korporation v. Rosen, 83 F. (2d) 225.

4. Section 13 (b) (1) of the Act contains an exemption with respect to employees of motor carriers who are subject to the power of the Interstate Commerce Commission

to fix their qualifications and hours of service. Under the primary-jurisdiction rule, a prior determination of facts must be made by the Commission before resort may be had to the courts.

The exemption runs to the power of the Commission; and the determination of employee status is in the nature of a legislative act necessary to implement the application of Section 7. As to this class of employees who would otherwise be subject to the dual jurisdiction of both statutes, the Fair Labor Standards Act speaks only from the date of the prerequisite determination of fact by the Commission.

Faulkner v. Little Rock Furniture Mfg. Co., 32 F. Supp. 590;
Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285;
Mitchell Coal & Coke Co. v. Pennsylvania R. R., 230 U. S. 247;
Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426;
West v. Smoky Mountain Stages, 40 F. Supp. 296.

ARGUMENT.

I.

THE SCOPE OF SECTION 7 (MAXIMUM HOURS) IS LIMITED, AND IS RESTRICTED TO THE CLASSES OF EMPLOYEES COVERED BY SECTION 6 (MINIMUM WAGES). THIS INTERPRETATION IS CONSISTENT WITH THE PROVISIONS OF THE ACT AND IS SUPPORTED BY THE LEGISLATIVE HISTORY OF THE ACT.

The primary issue in this case is whether the Fair Labor Standards Act by Section 6 was intended to raise minimum wages of that class of employees who are within the lowest-paid brackets, and through Section 7 to establish minimum overtime wages for the same class of employees covered by Section 6; or whether Section 6 of the Act, covering

straight time wages, alone had class limitations and Section 7, covering overtime wages, went beyond this class scope and applied to all classes of employees, irrespective of income or employment conditions.

There can be no question that Section 6 and Section 8 have as their sole purpose the establishment of minimum wages, nor can there be any doubt concerning the constitutionality of the Act insofar as the accomplishment of these purposes is concerned.

The interpretation of Section 7 is not so obvious and the meaning of its provision for overtime pay *"at a rate not less than one and one-half times the regular rate at which he is employed"* has been the subject of more frequent dispute and more confusing interpretation than any other single question in the administration and enforcement of the Act.[3] The office of the Administrator has itself issued conflicting interpretations.

Petitioner contends that the maximum hours provision of Section 7 relates to those persons governed by the minimum wage provisions of Section 6, and later by Section 8, i. e., the Act fixes maximum hours which may be worked at minimum wages, and requires that overtime be compensated at or in excess of one and one-half times these minimum wages. This construction is that Sections 6, 7 and 8 are intended to be read together as co-related provisions of one law accomplishing the one purpose of raising the standard of living for low-paid workers. The result of Section 7 is a tendency to spread employment among the same class of persons protected by Section 6. Therefore, overtime penalty wages are to be compensated at one

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[3] See petition of Administrator in this proceeding for leave to file brief and present oral argument as amicus curiae (R. 53-54).

and one-half times the straight time rates of employment provided for in Section 6. Respondent was at all times paid in excess of this minimum wage requirement and hence Petitioner has fully satisfied the law.

Respondent's interpretation of this disputed phrase broadens the scope of the law to the extreme of placing a ceiling on hours of employment for all persons regardless of salary or skill, with exceptions only as to those employees engaged in purely intrastate activities and those exempted by the provisions of Section 13. The legislative history of the Act appears to reveal that such an extensive scope goes far beyond the achievement of the particular objects that Congress had in view.

The question presented is not so simple as to merely involve literal construction as distinguished from Congressional intent. That statement of the case would presuppose that the so-called literal construction would be inconsistent with Congressional intent. Petitioner contends that the literal provisions are entirely consistent with the intent of Congress. The "regular rate" referred to in Section 7 can, and we think does, refer to any one of the numerous regular rates of pay established under Section 6 or which may be established under Section 8.

It is significant in reading the Act to note that the word "rate" appears in Sections 6, 7, and 8 a total of 14 times. A consistent interpretation of the phrase is possible if we consider this often repeated word to always relate to the same thing, namely, the minimum rate prescribed in Section 6, the minimum rate for overtime prescribed in Section 7, and the minimum rate to be established by the Administrator under his administrative powers as set forth in Section 8. Any other interpretation necessarily means that the word "rate" connotes a different thing at its vari-

ous places of use in the statute and that Congress did not intend it to always import the same meaning—"minimum wage".

Respondent assumes that "regular rate", as used in Section 7, disregards all other rates and ceilings on rates fixed by the Act, and his construction is that Section 7 reaches all rates and all classes of employees. This would be a strange result to flow from a minimum wage law, intended to merely make a small beginning in the field of federal wage and hour legislation.

Respondent's interpretation makes novel legislation of a statute which under Petitioner's construction is a sensible, progressive law following established patterns of minimum wage regulation. Furthermore, it raises serious doubts as to the constitutionality of the entire Section 7 of the Act.

It is therefore essential for the proper determination of the scope of Section 7 to carefully consider this language of the Act as an entirety, to reflect upon the purposes which are recited in the Act, to review its legislative history to ascertain the Congressional intent, and to determine whether the minimum wage and maximum hour provisions are included as conjunctive features of a minimum wage law or as independent features of two separate laws intended to accomplish the unrelated purposes of (a) floor on wages for a limited class and (b) ceiling on hours for an unlimited class.

Purposes Recited in the Act.

There is no doubt that the primary purpose of the Act was the establishment of a universal minimum wage in each industry engaged in commerce or production of goods

for commerce. This observation is of a certainty borne out by Section 8 (a) of the Act and also by the Declaration of Policy contained in Section 2 (a) and (b).

It is to be noted that no mention is made in any part of the Act of any purpose other than that of achieving the "objective of a universal minimum wage" in all industry engaged in commerce,[4] whereby "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers"[5] can be corrected "without substantially curtailing employment or earning power".[6]

It is essential that the statute be construed if possible so as to effectuate the purpose which Congress had *primarily* in view.

> *Platt v. The Union Pacific Railroad Co., et al.*, 99 U. S. 48.
>
> "But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment. . . ."
>
> *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 293.

In the case of *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534, at pages 543-4, the Court said that when the meaning of the words used in a statute "has led to absurd or futile results," it has looked beyond the words to the

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[4] "Sec. 8(a). *With a view to carrying out the policy of this Act by reaching*, as rapidly as is economically feasible without substantially curtailing employment, *the objective of a universal minimum wage* of 40¢ an hour in each industry engaged in commerce or in the production of goods for commerce. . . ."

[5] Section 2(a).

[6] Section 2(b).

purpose of the Act. Frequently, however, *even when the "plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words . . : however clear the words may appear on 'superficial examination' . . ."*

The Court further said:

> "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion.
>
> *"Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown'."*

It is also essential that the declaration of policy be considered where an aid to construction is needed.

> *Church of the Holy Trinity v. U. S.*, 143 U. S. 457;
> *Coosow Mining Co. v. State of South Carolina*, 144 U. S. 550.

Respondent's interpretation of the disputed phrase certainly produces an unreasonable and most revolutionary

result. It would result in regimenting all earners throughout the country without regard to any requirement of improving their "standard of living". It is in conflict with Sec. 2 (b), for if an employer must pay time and one-half a rate based upon the high wage he now pays, employers must of necessity reduce current high wages and decrease hours of work for all of their employees, whether hired at an hourly or weekly rate; but, Sec. 2 (b) provides that the sub-standard conditions mentioned in the Declaration of Policy should be eliminated without substantially curtailing employment or earning power.

Intent of Congress.

For proper construction of the Act it is therefore necessary to ascertain the intent of Congress. Full review of the legislative history of this statute, beginning with the President's message to Congress, and going through the Committee hearings, the Committee reports and the debates on the floor, fails to give any support for Respondent's contention that the phrase in question may be isolated from both the Act and its legislative history and be applied to employees generally without regard to rates of compensation, and to social and economic conditions which are wholly unrelated to the poorly paid classes of employees which alone concerned the nation and the Congress when the law was passed.

The Wage and Hour Manual, 1941 Edition, sets forth the President's message, page 747; the conference report and agreement, at page 749; the House amendment, at page 755; and conference agreement, page 759.

Further information concerning the intent of Congress may be had from the statements of the chairmen of the

committees in charge of the conference bill, and the explanations of committee members and others in the course of the debates.

In view of the fact that the present Fair Labor Standards Act was prepared by conferees, very little light is to be gleaned from the committee hearings. This legislation was pending before Congress for more than two years. The House and Senate passed radically different bills. Conferees were appointed and according to the custom, when there are such radical differences in the bills passed by the respective Houses that they cannot be reconciled, they proceeded to write a bill of their own.

Members of Congress seemed to have been uncertain as to the meaning of this bill which was produced by the conferees. Whereupon, Mrs. Norton, Chairman of the Labor Committee, one of the conferees, and sponsor of the legislation in the House, hastened to allay all fears and explain that they were dealing with minimum wages only. Here is what she said in her opening statement on May 23, 1938:

> "Let it be understood right here that this does not in any sense compel any person who is paying more than 40 cents an hour or working his employees less than 40 hours a week to do otherwise. We are not interested in that employer for the purposes of this bill. I say this because this question has been continually raised." (83 Cong. Rec. 7280).

Other interesting comments on various bills are as follows:

—S. and H. R. Conference agreement report—83 Cong. Rec., page 9254, June 14, 1938:

> "Sec. 7. * * * and 40 hours a week thereafter, with overtime work permissible upon the payment of one and one-half times the regular wage rate."

This Conference agreement superseded the original House provision shown at page 9252, which was as follows:

> "Sec. 5. * * * No employee is to be deemed to be employed in violation of this section if he receives additional compensation for his overtime employment at the rate of one and one-half times the regular hourly rate at which he is employed, or times the rate applicable under or pursuant to the act, *which ever is higher.*"

The Conference report superseded the Senate bill which was as follows, page 9250:

> "Sec. 5. * * * Nothing in the act or in any regulation or order of the board shall be construed to interfere with the right of employees to bargain collectively or otherwise engage in concerted activities to obtain a wage in excess of the applicable minimum under the bill or to obtain a shorter work week than the maximum work week under the bill, or other benefits or advantages."

Congressman Brewster, page 8428, June 7, 1938, compared the House and Senate Bills and made this statement:

> "The House bill provides that work over the maximum hours fixed by its bill will be permitted if time and a half for overtime hours is paid. The Senate bill requires time and a half, but between midnight and six o'clock in the morning, where continuous operation is not essential, overtime must be paid, even if maximum hours per week are not worked."

The Conference report, page 9251, June 14, 1938, further reported with reference to the Senate Bill:

> "Sec. 9. * * * *and the policy is declared that orders relating to wages shall affect only those employees who need legislative protection and shall not interfere with the voluntary establishment of appropriate differentials and higher standards for other employees in the occupation.*"

Senator Borah, page 9177, June 14, 1938:

"Q. Does this bill wipe out all differentials in all wages above the minimum wage in various parts of the country? A. Oh, no. *Only differentials in minimum wages and maximum hours of employment. Congress has no authority to deal with other wages.* All wage earners have a constitutional right to bargain for whatever wage they choose. *The Federal government only has authority to deal with minimum wages* because minimum wages and hours of employment relate to the health and general welfare of the citizens, and it legislates in this field solely because it can be justified on humanitarian grounds. Both federal and state constitutions forbid the fixing of any wage by law other than the minimum. * * * These will not interfere except in the only field where the federal government may interfere, namely, minimum wages. *Differentials in other wages are not and cannot be regulated by the federal government.*"

Chairman Norton, page 9256, June 14, 1938:

"You will recall that the House bill contained three basic principles: First, an absolute floor on wages and an absolute ceiling on hours. * * * On the other hand, the Senate bill contained just the reverse of these principles—a ceiling on wages and a floor on hours."

Congressman Curley (Member of Labor Committee on H. R. bill), page 7283, May 23, 1938:

"* * * This vast helpless group of *unskilled labor* are the exploited type so specifically requiring the protection of the strong arm of Uncle Sam. There is no conflict of jurisdiction under the provisions of this fair standards of labor bill and the existing labor organizations of this country. *The bill concerns only of relieving the paralysis which, at present, shackles misery and poverty to millions of heads of families, who are underpaid* and causing a collateral financial loss in purchasing power because of the existing deplorable conditions."

Congressman Ramspeck, page 7304, May 23, 1938, quoting New York Times of May 22, 1938:

> "The House wage-hour bill, it is true, does not absolutely prohibit a working week in excess of 40 hours, but provides that hours in excess of that must be paid for at the rate of one and one-half times the regular hourly rate. For many marginal firms and others this will be equivalent to prohibition, *particularly in view of the increases provided in regular hourly rates by the bill.*"

Congress was on notice that the nation understood "regular hourly rates" to be those which were provided as minimum wages under Section 6.

Congressman Voorhis, page 7323, May 23, 1938:

> "Mr. Chairman, this wage hour bill amounts simply to an attempt to raise a little the standards of the *poorest paid workers of this country.* It represents a statement by Congress that there is a standard below which no American citizen shall be asked to work. Certainly the standard is modest enough. With millions unemployed it is indeed difficult to see how a logical argument can be made for a longer week than 40 hours. But even that standard will not be reached for 2 years' time; and the bill, of course, does not actually forbid a work week of longer duration but requires that if a man does work additional time he should be *paid time and a half for it. The 25¢ minimum wage,* for which the bill provides in the first year of its operation, spells only $10 a week, and about $40 per month, and $480 a year. Even when we get up to a 40c minimum at the end of 3 years, workers protected by the act will only be receiving $768, for a year's work if they do not lose a single regular working day."

The phrase in question has not been passed upon by this Court although the purpose of the Act was stated by it in the case of *U. S. v. F. W. Darby Lumber Co.*, 312 U. S.

100, in which the constitutionality of the Act was sustained on the ground that it was within the commerce power and consistent with the Fifth and Tenth Amendments, the Court saying[7] (page 125):

> *"Both provisions are minimum wage requirements compelling the payment of a minimum standard wage* with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed."

In the case of *Wilson v. Rousseau, et al.*, 4 How. 646, this Court refused to permit a literal construction of a statute governing patents, saying (page 678):

> "Nothing short of the most fixed and positive terms of the statute could justify an interpretation so repugnant to the whole scope and policy of it, to wise an judicious legislation."

Petitioner submits a reasonable interpretation of the disputed phrase, consistent with the already discussed obvious purpose of the Act, and sound in that it does not involve an unconstitutional construction of Section 7. This reasonable and sound interpretation obtains by a reading of the maximum hour provisions of Section 7 as relating to the minimum rates prescribed in Sections 6 and 8.

It is not possible to urge that the law accomplishes two independent and unrelated purposes, namely, minimum wages and maximum hours. It is essential that the two be read together in order to sensibly apply the rule of each. In the case of *Drake v. Hirsch*, 40 F. Supp. 290, an employee worked at less than the statutory minimum rate prescribed in Section 6 and for a longer workweek than the maximum set forth in Section 7. A literal construction, strictly applied in such type of case would

[7] As to Sections 6 and 7.

result in an employee receiving time and one-half the actual rate at which he was employed, and if his actual rate were 18¢ an hour he would receive under such interpretation 30¢ an hour for the first 40 hours and 27¢ an hour for the overtime. The court, however, determined that both sections must be read together and that the minimum wage described by the Act necessarily becomes a legal "regular rate" upon which overtime is computed. Petitioner merely applies the corrolary of this rule.

There can be no question that this was intended to be a "poor man's" law. The Circuit Court of Appeals for the First Circuit, in the case of *Bowie, et al. v. Gonzales, et al.*, 117 F. (2d) 11, clearly points out that the purpose of the law was to cure and to eliminate *"the usual evils of sweatshop conditions of long hours indoors at low wages"* (Page 18).

From the foregoing discussion it is apparent that the Declaration of Policy, the legislative history, and the numerous provisions of the Act afford only a vacuum as a setting for Respondent's contention that Section 7 has a broader class coverage than Section 6. Furthermore, such contention compels the phrase *"not less than* one and one-half times the regular rate" to be inapplicable to all salary agreements and requires reformation of every salary agreement.

Cases Interpreting Section 7.

Under varying facts and circumstances, a number of federal and state courts have taken the view that the Fair Labor Standards Act was a minimum wage law which placed a floor below which employer and employee could not go in their wage contractual relations, and that the Act did not otherwise impair the right of contract, for

Section 7 had no application to highly paid employees beyond the classes covered by Section 6.

Fleming v. A. H. Belo Corp. (C. C. A. 5th), 121 F. (2d) 207;
Fleming v. Atlantic Co., 40 F. Supp. 654;
Fleming v. Stone et al., 41 F. Supp. 1000;
Gurlov v. Volk, 11 N. Y. S. (2d) 604;
Reeves v. Howard County Refining Co., 33 F. Supp. 90;
Schlee v. Lincoln Oil Co. (C. C. Wayne Co., Mich., 12/31/41), 5 Wage Hour Rept. 72;
Woods v. Wilkerson, 40 F. Supp. 131.
Bumpus v. Continental Baking Co. (C. C. A. 6th), 124 F. (2d) 549.

In *Reeves v. Howard County Refining Co.*, supra, in passing upon an action for amounts of money allegedly due employees under the Act, the court said:

> "The court understands the law to be that this Act . . . is what the name implies, a minimum wage and hour Act, and that parties may contract with reference to hours and compensation at will, provided the compensation to be paid is not less than the scale fixed by the law." (Page 91)
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> "Considering the number of hours actually worked, this pay exceeds the minimum time and overtime provided by the Act, and therefore complied with the Act, and the court finds that C. C. Reeves is not entitled to recover anything from Defendant, he having entered into a contract for a stipulated consideration which is in excess of the minimum wage fixed by the law, and that he had a right to make such agreement and having entered into such agreement, he is bound thereby." (Page 91)

In the case of *Fleming v. A. H. Belo Corp.*, supra, an elaborate review was made by the court of the legislative history and underlying purposes of the Act. In that case, the employees formerly had been engaged on a weekly

salary. In an endeavor to comply with the provisions of the Act, the employer made a contract of employment with them, at a basic hourly rate of pay (lower that the actual rate according to the Administrator's contention) which provided payment for overtime work at a rate of not less than one and one-half times such basic rate, with the guarantee that the aggregate pay for regular and overtime work would amount each week to as much or more than a certain definite sum[8] stated in the contract. The court stated at page 212:

> "When we turn to the legislative history of the Act, appellant stands no better. For there is no reference in the whole legislative history to prohibiting agreements between employer and employee, as here, for all inclusive and regular weekly salaries, none whatever to the effect that it was intended that persons already paying more than the minimum wage the Act provided, should be compelled to pay still more".

Some of the decisions in cases involving interpretation of the phrase appear to have been on a technical ground that where a contract existed between employer and employee, to do a job which involved a number of hours in excess of the maximum provided in Section 7, *the contract is honored* although the regular rate used by the employer in computing overtime at one and one-half times the "regular rate" is not the actual rate according to the interpretation of the Administrator.

Fleming v. Stone, et al., supra.

Also, where the contract was made in contemplation of the Act and the employer established what he called a "regular rate" (although this was at variance with the actual rate if the method of the Administrator is considered) and paid overtime at least one and one-half times the

[8] The former weekly salary, or higher.

so established "regular rate", such arrangement has been sustained by the courts as a valid contract not prohibited by the Act.

Fleming v. A. H. Belo Corp., supra;
Fleming v. Atlantic Company, supra.

If this Court follows the line of cases just mentioned, then necessarily Respondent can not recover for he was hired by contract made prior to the passage of the Act, to do a job which involved a varying number of hours, usually in excess of the maximum hours prescribed by Section 7.

Numerous federal and state courts have reached a different conclusion and held that Section 7 required the payment of penalty wages for all classes of employees regardless of salary, and with respect to salaried employees paid on a weekly or monthly basis it had the further effect of reforming the contracts by establishing straight time hourly rates in excess of the statutory provisions of Section 6. The principal cases are:

Bumpus v. Continental Baking Co. (C. C. A. 6th), 124 F. (2d) 549;
Dubois Soap Co. v. Floyd (C. A. Ohio, 9/15/41), 4 Wage Hour Rept. 541;
Fleming v. Carleton Screw Products Co., 37 F. Supp. 754;
Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300;
Haddad v. Beckerman Shoe Corp. (C. P. Berks Co., Pa., 5/5/41), 4 Wage Hour Rept. 329;
McLendon v. Bewley Mills (N. D. Tex., 12/10/40), 4 Wage Hour Rept. 30;
Muldowney v. Seaberg Elevator Co., Inc., 39 F. Supp. 275;
St. John v. Brown, 38 F. Supp. 385;
Williams v. General Mills, 39 F. Supp. 849.

The cases just above recited hold that the "regular rate of pay" is determined by dividing the total number of hours worked in any workweek into the total sum of wages paid. In two recent decisions, a new method of computation has been evolved to determine this mathematical "regular rate", viz.: division of the statutory number of hours provided in Section 7 into the total sum of wages paid.

McClure v. Schulze Baking Co. (C. C. Winnebago Co., Ill., 11/21/41), 5 Wage Hour Rept. 53;

Allen v. Moe (D. C., Idaho, 12/10/41), 5 Wage Hour Rept. 71.

Three Circuit Courts have passed on some phases of the questions. The general tenor of these Circuit Court decisions has been to extend the coverage of the Act, through Section 7 (maximum hours), to classes of employees not covered by Section 6 (minimum wages). It does not seem possible to reconcile the statements of the Circuit Courts with respect to the private right of contract for compensation in excess of minimum wages, and the actual effect of the decisions as applied to cases involving weekly or monthly wage contracts exceeding the minimum provisions.

Bumpus v. Continental Baking Co. (C. C. A., 6th), 124 F. 2d) 549;

Fleming v. A. H. Belo Corp. (C. C. A., 5th), 121 F. (2d) 207;

Missel v. Overnight Motor Transportation Co., Inc. (C. C. A. 4th, 1/5/42), 5 Wage Hour Rept. 25;

Warren-Bradshaw Drilling Co. v. Hall (C. C. A., 5th), 124 F. (2d) 42.

Rulings By The Administrator.

The Administrator of the Fair Labor Standards Act has from time to time been accredited with administrative rulings, and the argument is made in cases of the type in-

volved in the suit at bar that such interpretations of a new statute are entitled to great weight. However, it is not in any instance urged that the Administrator may by administrative ruling broaden or restrict the application of the statute which he has the responsibility of administering.

It is therefore necessary that we understand what is an administrative ruling and that we clearly distinguish it from a press release, interdepartmental instructions, correspondence and the like.

A true administrative ruling is required by Congress to be published in the Federal Register.[9] The required publication of these "rulings" was intended by Congress to give dignity to the pronouncement of interpretation by the Administrator and officially inform the public of these actions by the Administrator.

There can be no question that the Administrator of the Fair Labor Standards Act was well aware of this enactment and that if he intended his interpretations to have proper status it is fair to presume that he would have caused them to be published as required. Interpretative Bulletins Nos. 4 and 9 are not so published; they are not even signed. They are not set forth in the Federal Registry. They are not colored with any dignity whatsoever.

Furthermore, they relate to matters beyond the proper jurisdiction of the Administrator to rule upon inasmuch as they concern the statute not for the purpose of "setting its machinery in motion, of making its parts work efficiently and smoothly while they are yet untried and new", the purpose sanctioned by this Court in *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534, 549, but endeavor to pass final ruling on a question of jurisdiction, and this latter question is one solely for the courts.

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[9] *Federal Registry Act*, 44 U. S. C. A. 301, *et seq.*

It is not clear that the Administrator did intend to preempt the field of jurisdiction from the courts when he issued Interpretative Bulletin No. 9 in June 1940, for that Bulletin's preamble clearly states that it is merely indicative of the course the Administrator will follow until an authoritative ruling from the courts is had.[10] The revised Interpretative Bulletin No. 4[11] issued October 1940, contains no such limitation but it is not certain whether the Administrator omitted comment concerning status of that report through oversight or for the reason that he wished to assume jurisdiction over matters that properly belong to the courts. It is significant that this reissue assumes a position with respect to the proper interpretation of the words "regular rate of pay" which is diametrically opposite that taken by a former Administrator who was in charge on the date the law became operative,[12] and in conflict with the opinion given on April 1, 1941, by an Assistant

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[10] Interpretative Bulletin No. 9, 1941 W. H. Man. 293: "The Act confers no authority upon the Administrator to extend or restrict the scope of the exemption provided in Sec. 13(b)(1) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the course which the Administrator will follow in the performance of his administrative duties until otherwise required by the authoritative rulings of the courts."

[11] 1941 W. H. Man. 127.

[12] Labor Relation Reporter, October 24, 1938; 3 Wage Hour Rept. 228 (September 29, 1938): Open forum discussion at Birmingham, Ala. Mr. Andrews, former Wage-Hour Administrator, stated:

> ". . . Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's work."

Solicitor of the Wage-Hour Division to the field representatives of the Labor Department for their guidance in enforcing the law.[13]

In the *American Trucking Assns., Inc.* case, supra, the fact that the administrative rulings were not published in the Federal Registry was not brought to the attention of this Court nor considered in its opinion and it is urged that the Court would not have honored them had it been informed of this fact.

Position Of The Administrator.

The Administrator of the Wage and Hour Division, United States Department of Labor, was permitted by the Court below to intervene as *amicus curiae* and file brief. The underlying philosophy of the Administrator's contention was that the Act was purposed to spread employment, and that by requiring payment for overtime at one and one-half times an employee's "actual rate" as determined

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[13] 4 Wage Hour Rept. 181, 182 (April 1, 1941):

"The question is one of fact. . . . For our purposes the distinction between so-called irregular and fluctuating or regular workweek is much the same. The test is, does the employer hire the employee at a salary for a certain number of hours and does he, therefore, owe the employee additional compensation on a prorata basis when that specified number of hours is exceeded; or can the employer successfully contend that the facts and circumstances of employment are such that the salary is the employee's regular compensation for all hours worked, no matter what the exact number of hours may be? . . . We have to know when an employee works 60 hours and receives a salary of $30 in a given workweek, whether or not that $30 is all the employer owes the employee as his regular compensation for a workweek of such length. A test such as the following may prove workable: Is the salaried employee hired to do a job rather than to work a schedule of hours? Does the job necessarily involve irregular or fluctuating hours per day or week? The questions taken together constitute a single test; one question is not complete in itself."

by the mathematical formula prescribed by the Administrator, the employer would be discouraged from working one person many hours in excess of the maximum rather than dividing the work, with the result that employment would be afforded to others.

In this brief it was stated that Congress could have imposed a "rigid prohibition on work" in excess of the statutory maximum hours, and that it merely adopted a less drastic method by imposing a "penalty" on overtime work, which was intended to have a deterring effect, but nonetheless made it permissible to work in excess of the maximum hours if the penalty was paid.

The basic theme seems to be that Congress must have recognized it to be an anti-social condition for a wage-earner to be employed for a workweek longer than the maximum, and that it therefore set out to accomplish the ultimate goal of a maximum workweek. In response to this position, it should be sufficient to say that there is no indication of such purpose anywhere in the Act, and that there is a statement in Section 2 (b), as to existing employees, that the Act shall not be construed as "substantially curtailing employment or earning power".

Application of the Administrator's contention affects only those persons employed at the date the law became operative; *it spreads employment only as to the worker having a job;* it does not affect newly hired employees at all for cautious employers would establish a "regular rate" with time and one-half provision for overtime and the newly employed worker would still work a stipulated 50 or 60 hours as the case may be.

This construction reduces the "earning power" of existing employees, contrary to the declared purpose of the Act, for if the employee's "regular rate" is construed to be his

"actual rate" as computed by the Administrator, and if the intent is to spread employment and discourage overtime, it necessarily follows that the employee's earning power and employment is curtailed; i. e., he is paid 40 hours at his "actual rate", rather than 60 hours at his "actual rate".

Section 13 (a) exempts executive and administrative employees, whom the Administrator has defined as a person employed in such capacity and earning $30 per week or more. If the Act is purposed to correct anti-social conditions is it just as anti-social to have a $30 per week branch manager working a week of 60 hours as it is to have a $100 per week skilled mechanic working a week of the same duration.

Some of the cases sustaining the Administrator's view have stated that the overtime rate provision was intended to be "additional compensation as earning"—something like a bonus. The $30 per week executive, every employee of a railroad including nightwatchmen and gatetenders, and seasonal and agricultural employees are exempted from such bonus opportunity, and such interpretation presumes that Congress intended to discriminate against such persons.

The more logical interpretation of the exemption provisions of Section 13 (a) and (b) is that these persons do not require that their "standard of living" be raised inasmuch as they are employed at more than the minimum wage, and it was not necessary to legislate for them. The exemption obviates the need of complying with the requirements of Section 11 (c) with respect to keeping record of hours worked and wages paid to them.

Petitioner questions whether Congress could constitutionally legislate as to wages which are not related to health, morals, welfare, or matters affected by a public

interest. The law fixes no ceiling on hours and if paid at the proper overtime rate an employee could work 125 hours a week, if employer and employee desired to make such agreement. The law therefore is necessarily a minimum wage law and not a maximum hour law. Suffice to say that Congress has never yet arbitrarily fixed wages above a minimum where same were not related to some other federal power.

Wilson, etc., v. New, et al., 243 U. S. 332;
U. S. v. F. W. Darby Lumber Co., 312 U. S. 100.

The Administrator's position is that there can be no weekly salary agreement made in advance for the doing of a "job" and that a company cannot guarantee a worker a uniform salary affording pay while absent, sick, on vacation, or during slack season, even if such salary is in excess of the minimums of Sections 6 and 7. It is also that the "regular rate" of an employee working a varying number of hours per week can only be determined after the week's job has been done and the worker has been paid, and then, overtime compensation is computed to determine how much more is due. This is a strange "regular rate" indeed.

It is not believed that this Court will conclude that the phrase "regular rate at which he is employed" applies to the instant case where Respondent at all times was paid in excess of the minimum rate of Section 6 and one and one-half times such minimum rate for all hours in excess of the maximum prescribed by Section 7. Respondent was not employed at a rate per hour; his regular rate was his weekly rate and it is not sound to contend that an hourly rate can be computed from this weekly rate. An average of hours *customarily* worked per week can not be used in an effort to reach an hourly rate, for Respondent

did not work any *customary* number of hours per week. The inescapable conclusion of Respondent's argument is that "the regular rate at which he is employed", when applied to Respondent, varies from week to week; nothing could be more strained than to urge that his "regular rate" is this fluctuating, mathematical hourly rate—*a most irregular rate.*

Finally, let us suppose the following situation and the effect of Respondent's contention thereon. A company employing a worker at $30 for a sixty-hour week is mindful of the law and of the Administrator's Interpretative Bulletin No. 4 and computes that thereunder the worker is entitled to an additional sum of $4.00 to offset the overtime requirement for the sixty-hour week. Without discussion with either the worker or a representative of the Administrator, the salary is increased to $34 per week. The worker thereafter brings suit under the Act, and contends as to the latter period that his regular rate of pay is $.567 per hour ($34 ÷ 60) and for 44 hours he is entitled to $24.95; that his overtime rate of one and one-half times the regular rate is $.851 per hour and for the additional 16 hours he is entitled to $13.62; making the total sum due of $38.57, or a deficiency of $4.57 each week.

No construction in good conscience could permit such a travesty of justice and for some special reason then evolved, those courts which sustain Respondent's view would of certainty deny the worker's claim for a "windfall". But any special ground would be at variance with the Administrator's interpretation of the law.

In the case at bar a wage increase of $2.00 per week was given seven days after the law became effective, but here the undisclosed intention was to reward a deserving employee for faithful and loyal service. Could any sound

distinction be made to rationalize a difference in result? Are the circumstances of each individual employment contract, in fact as well as those unexpressed and in contemplation only, to be considered in order to determine whether or not the law has been violated? Was it the intention of Congress to require the employment contracts of a multitude of types and relating to millions of persons to be remade so as to conform to a uniform, standard pattern supposedly fixed by this law?

Under Respondent's interpretation this $2.00 increase in his weekly salary served only to raise the "rate" upon which his claim of overtime is premised, and resulted in enlarging the amount claimed in this suit, or to state it bluntly, the intended generous and voluntary increase by Petitioner actually became a boomerang if this contention is sustained by this Court.

The national ills which the Act in its declared policy was intended to correct would be nothing in comparison to the economic national ills which would result from this strained application of the overtime rule which is urged by Respondent in this case; the cure would be far worse than the disease. *In the trucking industry alone, which relied on the statutory power of the Interstate Commerce Commission under Section 204 (a) (1) and (2) as construed by a three-judge court in American Trucking Assns. v. U. S. 31 F. Supp. 35, together with the exemption in Section 13 (b) of the Fair Labor Standards Act, all of which found expression in thousands of collective bargaining agreements with unions, the potential claims would exceed the total capital of this industry which employs more persons than any other in America, excepting only agriculture and retail trades.*

The conclusion is compelling that the law is but intended to place a floor below which the rate of wage could not go, but otherwise, existing contracts were not reformed and the freedom of contract was not impaired.

II.

THE PRIVATE RIGHT OF CONTRACT IS NOT DESTROYED BY THE ACT, BUT IS MERELY RESTRICTED BY A MINIMUM WAGE FLOOR BELOW WHICH EMPLOYER AND EMPLOYEE MAY NOT CONTRACT. PETITIONER IS ENTITLED TO THE USUAL AND ORDINARY PRESUMPTION THAT THE PARTIES CONTEMPLATED COMPLIANCE WITH THE LAW IN THEIR OVER-ALL CONTRACT.

Respondent was employed by Petitioner prior to the passage of the Act and for two years subsequent thereto. He was always employed by the week at a weekly salary. He was the office man at a small truck terminal where the volume of business varied from day to day, week to week, and according to the seasons of the year and change in business conditions. There was never enough business for an around-the-clock office set-up. During slack periods, the on-duty hours would be as low as 40, possibly less, and during periods of unusual activity, he would have to look after matters which involved being on duty or responsible for results, for as much as 75 hours.

In a limited sense, he was in charge because there was no one present at all times to direct his activities. He knew when the trucks were expected to come and expected to go, and he adjusted his on-duty hours, or presence at the terminal, according to his judgment as to the necessities of the occasion. These were the facts which led to his employment to do a job, as distinguished from employment by the hour or for a particular number of hours per week.

He was entitled to some absent time with pay, and if he was sick or had any other occasion to be away from his

job for reasonable periods, no deductions were made from his salary. In many respects, he might be considered as a minor executive or administrative employee of the kind exempt under Section 13(a) of the Act. But the Administrator was given the power to define administrative and executive employees and under the Administrator's definitions, from time to time, there may be some doubt whether he can be qualified as an executive or administrative employee, because he did a certain amount of detailed work which was not of a strictly administrative or executive nature.

During the two years that the Act was in effect, Respondent never questioned his employment arrangement. The first notice Petitioner had of any claim was this suit which was filed after the employee had resigned to take a better place with another company. The opinions of the Courts below disclose that even when the suit was filed, the employee did not have in mind a definite claim or contention with respect to any unpaid wages. The bill of complaint, as amended, was in the alternative, on the theory that there might be some possible constructions of the Act which could, in some way, result in a recovery. It was stipulated, by way of illustrating the legal question, that the maximum number of hours for any week or two during the two years he worked after the Act became effective, would be approximately 75 hours. This was done for an assumed maximum week in order to test the theory of the case.

The contract as it was understood and applied by the parties:

Rate—$27.50 per week.

Short week example: Workweek—slack period—40 hours x 30¢ per hour, minimum wage under Sec. 6—$12.00 per week. Employer paid additional $15.50 in cash in ex-

cess of minimum and gave vacation and sick leave with pay. Consideration for excess payments—availability of trained employee's service for both slack and peak business periods.

Long week example: Workweek of 75 hours at 30¢ per hour under Sec. 6—$22.50, assuming that Sec. 7 is not applicable because of the exemption in Sec. 13(b).

If Sec. 7 were applicable to Respondent, the agreement would cover a workweek of approximately 75 hours, as follows: 30¢ for 42 hours—$12.60, plus 33 hours at 45¢ —$14.85, or $27.45 per week.

Respondent now says that the contract which the parties made and performed under for two years was null and void by reason of the Fair Labor Standards Act, and that instead of $27.50 per week being compensation for the job and the hours worked, it covered only the statutory workweek of 42 hours. He claims that his pay is $0.655 per hour ($27.50 divided by 42 hours), or more than twice the minimum wage covered by law, and then demands more money for overtime at penalty rates.

Applying this theory to a workweek of 75 hours, Respondent claims 42 hours at $0.655, or $27.50, plus 33 more hours at one and one-half times $0.655 or $0.982 per hour, or $32.40. He adds the sum of $32.40 to the $27.50 per week which was paid, making a total of $59.90 per week, and then claims an additional penalty of $32.40 per week, making a total of $92.30 per week. To this total is added attorney's fees and costs.

Respondent now says, as one of his alternative claims, that instead of $27.50 per week being compensation for the job and the hours worked, the payment covered only straight time pay for these hours of work, and that no

penalty wage, required by law, was paid for the overtime hours. The Court below adopted this latter view.

For straight time and overtime, this employee was always paid in excess of the wage prescribed by the Act, and during the short weeks he received greatly in excess of the hourly rates fixed under the Act. It is said, by the Administrator, that an employer may not average the compensation given an employee over more than one week, and even if that be so, in this case, Petitioner contends that the law was fully complied with for every week computed separately.

There is nothing in the Act which appears to prevent the making of wage contracts on a lump sum basis. However, the Circuit Court decided that if a man is employed by the week, at a flat weekly salary, the employer at the end of the week must divide the total number of hours worked into the total compensation paid, thereby determining for the first time his straight time pay. Thereupon, the employer is necessarily further indebted to the employee for the overtime hours at one and one-half times the straight time wage so determined. This ruling prohibits a weekly or monthly salary agreement with any kind of an employee subject to the Act, to cover indefinite hours, even though the lump sum salary exceeds straight time minimum wages under Section 6 and overtime wages measured by Section 6 standards.

This construction given the Act has a two-fold effect. It not only extends the coverage of the Act to classes of employees above the minimum wage classes and compels the payment of overtime at penalty rates on wages far in excess of minimum wages, but it has the further effect of reforming contracts so as to establish straight time wages in excess of those fixed by Section 6. For example:

If the employee was paid $27.50 per week and worked 50 hours, his straight time hourly rate would be determined by dividing 50 hours into $27.50, which produces $0.55 per hour or 83% in excess of the maximum straight time rate prescribed under Section 6. Nevertheless, the employer would still owe the employee the penalty rate under Section 7 for 10 hours to the extent of an additional 50% of this so-determined straight time rate.

So, we not only have the question as to whether Section 7 covers employees in the high-salaried brackets, but we have the further result that the straight time wages are raised far in excess of the limitations placed in the Act by both Sections 6 and 8.

This Court in the *Darby* case, supra, sustained the constitutionality of the Act on the grounds that the commerce power may be properly employed to prevent "spreading and perpetuating . . . sub-standard labor conditions". At pages 115-116, the Court said:

> "The motive and purpose of the present regulation is plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under sub-standard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows . . . we conclude that the prohibition of the shipment interstate of goods produced under the forbidden sub-standard labor conditions is within the constitutional authority of congress . . ."

It is Petitioner's contention that though the constitutionality is clearly settled as to the question of correcting "sub-standard labor conditions", a construction of the Act which has no relationship whatsoever to "sub-standard labor conditions" would nonetheless be unconstitutional,

for the potentiality of such a construction is to destroy freedom of contract between employer and employee.[14]

Wilson, etc., v. New, et al., 243 U. S. 332;
Remer v. Czaja, 36 F. Supp. 629.

Minimum wage legislation has been upheld on the ground that it is a proper exercise of the police powers which have direct relationship to the establishment of a rate essential to "the minimum requirement of health and right living".

West Hotel Company v. Parrish, 300 U. S. 379.

The *Darby* case followed the *West Hotel Company* case, stating at page 125:

> "Since our decision in *West Hotel Company v. Parrish*, 300 U. S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment."

The *West Hotel Company* case overruled a long line of prior decisions which held minimum wage statutes unconstitutional for the reason that they had no relation to the reasonable value of the workers' services and that they thereby violated the Fifth or the Fourteenth Amendment as the case may be. In one of these cases Mr. Justice Holmes (dissenting) stated:

> "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirements of health and right living."

Adkins v. Childrens Hospital, 261 U. S. 525, 570.

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[14] See The Federal Wages and Hours Act, 52 Harvard Law Review 646, 666, expressing the serious constitutional doubts that would arise if the Act were to be interpreted as applying to "wages or hours that are more than sufficient according to present Congressional criteria".

The position of Respondent is necessarily that Congress has such power to regulate commerce that, irrespective of the question of public health, morals and general welfare, it can willy nilly establish an arbitrary sum which must be paid to all employees "in commerce". Such a position maintains that Congress can regulate maximum wages as well as minimum wages, which is directly contrary to all of the rulings of this Court prohibiting unwarranted interference with the freedom of contract in respect to personal employment, which "is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons who have no other honest way to begin to acquire property, save by working for money".

Coppage v. Kansas, 236 U. S. 1, 14.

It is pertinent in this regard to consider the dissent of Mr. Justice Sutherland in the *West Hotel Company* case, "it is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages". Furthermore, exercise of such power with respect to wages above the minimum under the guise of regulating commerce could be used against employees and for employers. It would constitute an abandonment of all constitutional safeguards respecting employment and freedom of contract. It necessarily results in economic totalitarianism.

In the case of *Fleming v. A. H. Belo Corp.*, 121 F. (2d) 207, at pages 214-215, the Court said:

> "Freedom of contract, within constitutionally valid limitations, is, in the United States of America, one of the fundamental freedoms and this particularly so in regard to labor relations. When, then, it is contended as here, that a statute has cut off or limited this freedom, a litigant, must point to something more than his opinion that it ought to be cut off or limited,

must point to language clearly and validly so providing. There is no more authoritative principle in the field of labor law than that, subject of course, to valid statutes designed to prohibit substandard conditions and unfair labor practices, wages, hours, and work conditions are the proper subject of contract between employer and employee and their agreements must be, and are, given full effect in the courts.

* * * * * * *

"Whether Congress could constitutionally fix a minimum wage and then compel employers wishing to provide for fixed weekly salaries to pay a wage higher than the minimum so fixed, might raise a serious constitutional question."

Similar comments have been made by other federal and state courts in several cases. In *Fleming v. Stone*, 41 F. Supp. 1000, at page 1004, the court said:

"To be sure these agreements were made previous to the passage of the Act, but if, before the passage of this Act, defendants and their employees agreed that the weekly salaries for fluctuating hours should cover any overtime which they might work in any given week, I can find nothing in the Act which prohibits the continuance of such contracts after the passage of the Act, provided the minimum-wage conditions of the Act are complied with. There is no charge in the present complaint that the minimum-wage provisions of the Act are not complied with."

In the case of *Schlee v. Lincoln Oil Co.*, (C. C., Wayne Co., Mich., 12/31/41) 5 Wage Hour Rept. 72, at pages 74 and 75, the court said:

"When this contract of February, 1939, was made, I am convinced that both plaintiff and defendant understood the $35.00 a week was to be in full of regular time and overtime as well . . . The contract between employer and employee was based upon this understanding, and such a contract between employer and

employee is a valid contract so long as it does not contravene the minimum-wage provided in the Wages and Hours Act".

The decisions in the cases of *Woods v. Wilkerson*, 40 F. Supp. 131, and *Fleming v. Atlantic Co.*, 40 F. Supp. 654, are to the same effect.

The Act was not passed as emergency legislation, of temporary nature, but was of permanent character. It is therefore necessary to interpret it with a view that Congress intended it to be applicable to changing economic conditions, which were certain to arise.

The construction for which Petitioner contends is unquestionably consistent with the constitutional powers of Congress. There is nothing in the Act which in any way indicates that Congress intended to go beyond this recognized application of its legislative powers. Conversely, the interpretation maintained by Respondent that the contract is reformed, if upheld, would result in the substitution of governmental fiat for the system now enjoyed of free enterprise. It is not to be presumed, in the absence of the most fixed and positive terms of a statute, that Congress intended to pass unwise and non-judicious legislation.

Wilson v. Rousseau, et al., 4 How. 646;
Wilson, etc., v. New, et al., 243 U.S. 332.

The effect of the ruling by the Court below is that the contract of employment must be reformed in a manner that forces the straight time wage above the minimum prescribed by Section 6, thereby forcing the result that overtime has not been paid in accordance with Section 7. How can it be legally possible through judicial reformation of the contract to force the straight time wage above the limitations set by Congress? How can it be legally possible

through judicial reformation of contract to convert compliance with the law into a violation of the law? It is only by reason of a judicial reformation which increases the straight time wage above the statutory minimum that any violation of Section 7 can be claimed.

III.

THE DOUBLE PENALTY PROVISIONS OF SECTION 16, AND THE OVERTIME PAY PROVISIONS OF SECTION 7 IN THE NATURE OF A PENALTY, ARE DISCRETIONARY WITH AND NOT MANDATORY UPON THE COURTS IN CASES OF GOOD FAITH LITIGATION, AND A RULING THAT THEY ARE MANDATORY DEPRIVES PETITIONER OF THE PROTECTION OF THE "DUE PROCESS" PROVISIONS OF THE CONSTITUTION.

It is contended by Petitioner that the entire claim of Respondent is in effect one for the assessment of a penalty, and because of this nature of the suit it is not mandatory upon the Court to necessarily allow it.

The suit concerns the application of two penalties. The provisions of Section 16 (b), providing that an employee may recover unpaid compensation found to be due him, and "an additional equal amount as liquidated damages", are contained under the sub-heading "Penalties" and the title well describes the nature of the thing. In the case of *Thompson, et al. v. Daugherty*, 40 F. Supp. 279, the court commented, at page 286, "The intrinsic nature of the additional allowance would seem to make it a penalty rather than properly liquidated damages . . ."

The double recovery is nonetheless a penalty despite the wording of the statute "liquidated damages". The court in the case of *Anderson v. Meacham*, 62 Ga. App. 145, 8 S. E. (2d) 459, at page 460, stated: "The fact that an employee may bring his action for an additional equal amount as liquidated damages is nothing more or less than a pen-

alty fixed or incurred under the law of the United States. We think the employee in this case having elected to bring his action for a penalty . . . is restricted to the United States court for his relief . . ."

The provisions of Section 7 are that an employee is entitled to recover one and one-half times the regular rate for overtime employment in excess of the maximum hours therein provided. Such type of provision has been held to be a "mild penalty" by this Court in the case of *Bunting v. Oregon*, 243 U. S. 426. In construing this particular section in the case of *Fleming v. Carleton Screw Products Co.*, 37 F. Supp. 754, at page 758, the court said "This section does not purport to regulate wages but imposes a penalty on overtime work . . ."

The theory of penalties usually contemplates a public purpose rather than a private purpose. Whether some public purpose is to be served by limiting the sovereign's right to inflict penalties where the violations were wilful and not so limited when the penalty is inflicted by a private suit, would seem to be open to question.

Comparing the penalty provisions of the Fair Labor Standards Act with those of numerous other acts which have come before this Court, it does not appear that there is any difference in the discretionary powers of the Court when parties have, in good faith, sought to have their rights and liabilities determined.

Petitioner, a common interstate motor carrier, operating under the authority of the Interstate Commerce Act, Part II, had *bona fide* reason to believe that it was not subject to Section 7 of the Act because of the exemption provisions contained in Section 13 (b). The exemption included every employee "with respect to whom the Inter-

state Commerce Commission has power to establish qualifications and maximum hours of service".

Section 204 (a) (1) of the Interstate Commerce Act, Part II, gave the Commission authority, as to common carriers, to prescribe "qualifications and maximum hours of service of employees" and there was no limitation contained in that statute with respect to classes of employees or purposes of regulation. This provision is to be distinguished from that in Sub-Section (3) of that law, relating to private carriers, that the Commission should establish, *if need therefor is found,* qualifications and maximum hours of service of employees insofar as safety of operation of vehicles was concerned. As to common carriers no exceptions or purpose was provided but as to priyate carriers a specific purpose was stated.

A controversy resulted as to whether all employees of common carriers were exempted from the effect of Section 7 by reason of the fact that Section 13 (b) provided that the former Section should not apply to employees who were subject to the power of regulation of hours by the Commission. The question was the extent of the powers of the Commission.

American Trucking Associations, Inc., national trade association for the motor carrier industry, appeared and participated as representative of its members, of which Petitioner is one, in all of the many proceedings before the Commission having reference to that body's power under Section 204 (a) to establish maximum hours of service for employees of interstate motor carriers.

The Commission prescribed on January 27, 1939 maximum hours of service for drivers employed by common and contract interstate motor carriers in *Ex parte M C-2,*

11 M. C. C. 203, and on May 1, 1940 maximum hours of service for drivers employed by private interstate motor carriers in *Ex parte MC-3*, 23 M. C. C. 125.

On May 9, 1939, in *Ex parte MC-28*, 13 M. C. C. 481, the Commission determined, subsequent to several hearings held for that purpose, that its power to establish qualifications and maximum hours of service was limited to those employees who were engaged in duties which affected safety. The Association promptly, on May 26, 1939, brought suit to set aside the findings of the Commission, and on December 4, 1939, a three-judge court in *American Trucking Assns., Inc. v. U. S.*, 31 F. Supp. 35, rendered its decision favorable to the Association's contention that the Commission had jurisdiction over all employees of for-hire motor carriers, but recognized the limitation with respect to private carriers.

This Honorable Court in *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534, in a 5-to-4 decision reversed the lower court and sustained the Commission's finding. This decision was rendered May 27, 1940, and petition for rehearing was denied Oct. 14, 1940, 311 U. S. 724. This litigation on the jurisdictional question covered more than a two year period and during that period the motor carrier industry pursued its every course in order to determine which of these two Acts governed it.

The final decision by this Court that the Commission's jurisdiction was limited to safety did not afford any answer to the question of "which employees are engaged in activities affecting safety" and this answer was not known until the finding made by the Commission on that question on March 4, 1941, in *Ex parte Nos. MC-2 and MC-3*, 28 M. C. C. 125, that its jurisdiction went to me-

chanics, loaders and helpers (in addition to drivers) employed by common, contract and private motor carriers.

Respondent was engaged in several duties, one of these being the dispatching of trucks. In that position it was necessary that he know the size and capacity of the vehicles and the weight limitations governing highways and bridges, and issue proper loading instructions so that axle loads would be in compliance with law. The employer could not anticipate whether or not the Commission would take jurisdiction over "dispatchers", and there was the added question whether or not this particular employee was a supervisor or administrator, and as such exempted by Section 13 (a) from the overtime provisions of Section 7.

The fixing of exhorbitant liquidated damages by legislative fiat without opportunity to test the issues before the courts would undoubtedly be a denial of "due process" if as Respondent contends and the Circuit Court held, the imposition of such penalties is mandatory and not discretionary with the Courts. In this case the situation is aggravated because of the assessment of penalties retroactively from date of findings of fact by the Interstate Commerce Commission, and Petitioner could not possibly anticipate what these findings would be.

In the case at bar Petitioner through its trade association[15] diligently endeavored to ascertain the proper administrative agency having jurisdiction over it. The claimant had made no demand for the penalty to be applied, and voluntarily accepted the money as full payment. Courts in numerous cases arising under various statutes have refused to award a penalty in good faith litigation involving pri-

[15] American Trucking Assns., Inc.—see petition of that body to intervene in this proceeding as *amicus curiae* (R. 51-52).

vate parties, stating that to do so would prohibit a litigant access to the courts in an effort to obtain a ruling on the matter in controversy.

The comment of a federal court in considering the penalty provisions of the Gold Reserve Act, clearly states the law as laid down by this Court in numerous cases: "Though defendants should not prevail in such a suit, proceedings instituted in good faith to test rights have never, to our knowledge, been followed by the imposition of penalties, fines, or imprisonment." *Uebersee Finanz-Korporation, etc. v. Rosen*, 83 F. (2d) 225 (1936).

This has been the uniform ruling of this Court and the lower courts involving various other acts in numerous cases. Among the more important acts is the so-called "Seamen's Act," 46 U. S. C. A. 596, which prescribed certain penalties for withholding wages. This penalty question was passed upon in a great number of cases, some of which are:

Franco, et al., v. Seas Shipping Corp., 272 Fed. 542 (D. C., Md., 1921);
Meyer v. Dollar S. S. Line, 43 F. (2d) 425 (D. C., Wash., 1930);
O'Hara, et al., v. Luckenbach S. S. Co., 16 F. (2d) 681 (C. C. A., 1926);
Pacific Mail S. S. Co. v. Ed. Schmidt, 241 U. S. 245 (1916);
The Cubadist, 252 Fed. 658 (D. C., Ala., 1918);
The Geo. W. Wells, 118 Fed. 761 (D. C., Mass., 1902);
The Silver Shell, 255 Fed. 340 (D. C., N. Y., 1918).

The provisions of the Federal Trade Commission Act with respect to penalties were similarly passed on in *Federal Trade Commission v. Millers National Federation*, 23 F. (2d) 968 (1927).

Numerous state acts involving penalties have been reviewed by this Court:

Chesapeake & Ohio Ry. Co. v. Conley, 230 U. S. 513 (1912);
Ex parte Young, 209 U. S. 123 (1908);
Missouri Pacific R. Co. v. Tucker, 230 U. S. 340 (1913);
Natural Gas Pipe Lines Co. v. Slattery, et al., 302 U. S. 300 (1937);
Oklahoma Operating Co. v. Love, et al., 252 U. S. 331 (1920);
St. Louis Iron Mountain & S. Ry. Co. v. Williams, et al., 251 U. S. 63 (1919);
Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651 (1915).

In all of these cases, it was held that the infliction of penalties during the period of good faith litigation would be in conflict with the "due process" provisions of the Constitution.

In the case of *The Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940), this Court continued the protection of a good faith litigant to the time of denial of petition for re-hearing.

The case at bar involves a fundamental difference from the facts in those cases arising under this Act which held that the imposition of the "liquidated damage" feature was mandatory upon the courts. None of those cases concern an employer subject to the Interstate Commerce Act. None concerned an employer who was left in a twilight zone relative to jurisdiction under the two Acts until the question was finally set at rest when the Commission made its finding.

In the Fair Labor Standards Act we have a law which with respect to the application of Section 7 is dependent

upon a factual determination by the Interstate Commerce Commission. A precedent is found in the Railway Labor and Carrier Taxing Acts where the application of these acts to electric lines is contingent upon a factual determination by the Commission. In connection with these latter acts the courts have enjoined the imposition of penalties prior to determination of the facts by the Commission.

Chicago S. S. & S. B. R. R. v. Fleming, 109 Fed. (2d) 419 (1940).

In the case of *Clour v. Jones* (E. D. Okla., 6/19/41), 4 Wage Hour Rept. 353, the court refused to assess a penalty for double damages where it found the employer had believed in good faith that the Act did not apply, stating at page 353 "under that state of facts the court does not believe that the defendant should be required to pay an amount as liquidated damages, having compensated the plaintiff in full for his overtime to date of his discharge".

The Petitioner should be exempted from both of the penalty provisions of this law, for it acted in good faith and this suit was brought prior to the determination by the Commission on this most controversial question. The penalties are not retroactive in effect but speak as of the time of the determination by the Interstate Commerce Commission on March 4, 1941, concerning which employees in the transportation business conducted by the Petitioner are exempted from the provisions of Section 7 of the Act.

The ruling of the Court below which inflicted penalties to be recovered by a private party, retroactively and during the period of good faith litigation, is believed to be in the teeth of the established law governing the question.

It might be added that the good faith of Petitioner in litigating these issues has never been questioned; the Court

below had this to say (R. 77): "It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authorities in the courts, to be subjected to such a measure." However, the Court made no effort to distinguish the Fair Labor Standards Act from the other acts in connection with which this Court has held that penalties could not be inflicted during good faith litigation. The fact that this Court in *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534, divided 5 to 4 on one of the controlling issues in this case—whether penalty wage provisions of the Act applied to the motor carrier industry at all—is clearly indicative of the *bona fides* of the litigation.

IV.

THE ACT IMPOSES A LEGISLATIVE FUNCTION TO BE PERFORMED BY THE INTERSTATE COMMERCE COMMISSION FOR THE PURPOSE OF IMPLEMENTING THE SCOPE OF SECTION 7, AND PRIOR DETERMINATION OF FACTS BY THE COMMISSION IS A PREREQUISITE, UNDER THE PRIMARY-JURISDICTION RULE, TO ACTION BY THE COURTS.

Petitioner makes the further contention that by reason of the exemptions contained in Section 13 (b) only the provisions of Section 6 of the Fair Labor Standards Act applied to Respondent during the term of his employment, and inasmuch as Respondent was at all times paid an amount in excess of the straight time minimum wages prescribed by Section 6, he is entitled to no additional compensation.

This case comes before the Court following a series of legal and administrative proceedings which were necessary for the purpose of determining whether Section 7, the maximum-hour provisions of the Fair Labor Standards Act, was applicable to Petitioner and Respondent under any circumstances, and subsequently, proceedings were

held for the purpose of determining under what circumstances the parties might be subject to the Act.

By way of explanation of the prior proceedings, attention is called to certain exemptions in Section 13(b) of the Act. That Section exempts from the maximum-hour provisions of Section 7, "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (now referred to as the Interstate Commerce Act, Part II)".

Petitioner believed that the Interstate Commerce Commission had power to prescribe qualifications and maximum hours of service for all employees of common and contract carriers under the provisions of paragraphs (1) and (2) of Section 204, and that the Commission's jurisdiction was limited under paragraph (3) of the same Section to private carrier employees whose duties affected safety. That question reached this Court in the case of *U. S. v. American Trucking Assns., Inc.*, 310 U. S. 534 (May 27, 1940), in which this Court held, by a 5-to-4 decision, that there was no distinction in the Commission's power as between for-hire and private carriers and that the Commission's jurisdiction was limited to employees whose duties affected safety. A petition for rehearing was denied by this Court on October 14, 1940, 311 U. S. 724.

Following this decision, the Interstate Commerce Commission instituted an investigation to determine which employees had duties affecting safety, and that proceeding before the Commission, known as *Ex parte MC-2 and MC-3*, decided March 4, 1941, is reported in 28 M. C. C. 125.

Respondent instituted this suit on October 29, 1940, which, it will be observed, was prior to the determination by the Commission of the question as to whether the duties of a dispatcher affected safety. Petitioner moved to dismiss the suit on the ground that the Interstate Commerce Commission alone had the power to make a factual determination because of the necessity for uniform application throughout the country, and as the proceedings before the Commission had not been completed, Respondent's action was premature.

This Court has said that "when the final act (of a Commission) is legislative, the decision which induces it cannot be judicial" and therefore "litigation can not arise until the moment of legislation has passed".

Prentis v. Atlantic Coast Line Co., 211 U. S. 210.

The District Court overruled the motion for dismissal on February 20, 1941, *Missel v. Overnight Motor Transportation Company, Inc.*, 36 F. Supp. 980. After certain pretrial conferences and agreements with respect to stipulations, the case was argued on its merits before the District Court on April 24, 1941, and was decided July 28, 1941, 40 F. Supp. 174.

It is to be noted that between the date of the decision denying the motion to dismiss on February 20, 1941, and date of hearing on the merits, April 24, 1941, the Commission rendered its decision on March 4, 1941, determining the status of employees such as Respondent, which fact rendered moot the question as to the jurisdiction of the Court to determine the status of Respondent in advance of a determination by the Commission. However, the date of the Commission's determination remained of great importance because there was presented the question as to whether this factual determination and the legislative pro-

ceedings by the Commission spoke for the future or could possibly have the effect of creating retroactive liabilities and penalties under the Fair Labor Standards Act.

The law imposes upon the Interstate Commerce Commission the duty of determining which employees have duties affecting safety, and that determination when made establishes the scope of Section 7 as to transportation employees. The Commission's jurisdiction is broader than the mere matter of hours, because it also is required to establish qualifications of employees, a matter not dealt with in the Fair Labor Standards Act, and the exemption of Section 13(b) runs to both powers of the Commission.

We take the view that action by the Commission is necessary to implement the Fair Labor Standards Act as to transportation employees. Congress well understood the necessity for uniform treatment of transportation matters involving interstate commerce and knew that the Commission and not the Administrator was the proper body to make these determinations. The Commission fixes rates, determines the income of the carriers, and necessarily must lead and not follow in cases of this kind. The Commission conducted an exhaustive investigation which required time before it determined which employees were engaged in duties affecting safety. Petitioner contends that the determination by the Commission fixed the date for the application of Section 7 of the Fair Labor Standards Act. The Courts below ignored these questions in the opinions although they were presented and argued.

In delegating to the Interstate Commerce Commission jurisdiction to make the necessary determinations, which in turn affects the coverage of the Act, Congress merely followed a long-established procedure under the Railroad Labor and Carrier Taxing Acts. The coverage in these

statutes was contingent upon a determination by the Commission of classes of railroads, such as the distinction between steam roads and interurban lines, etc. These laws were mandatory upon the carriers, but they were not effective until they were implemented by findings by the Interstate Commerce Commission.

In a number of cases involving the construction of statutes administered by the Interstate Commerce Commission, this Court has held that the necessity for uniform rulings was an essential part of the scheme of regulation of interstate transportation and such uniformity can only be established by the Commission and cannot be established by the courts.

In the case of *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), an action was brought by a shipper against a common carrier for relief from an unreasonable freight rate charged on an interstate shipment. The court denied redress, stating that the Interstate Commerce Commission had sole original jurisdiction on the question of reasonableness of rates, and that to determine otherwise on the statute involved would prevent uniformity in freight charges which was one of the basic purposes to be accomplished by the Interstate Commerce Act.

Armour & Co. v. Alton R. Co., 312 U. S. 195 (1941);
Mitchell Coal & Coke Co. v. Pennsylvania R. R., 230 U. S. 247 (1913);
Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285 (1922);
Texas & Pacific R. Co. v. American Tie & Timber Co., 234 U. S. 138 (1914).

It is unfortunate that in this case the Court below did not discuss the question, because insofar as Petitioner is concerned, it is of vital importance.

The Administrator has taken the position that all employees subject to this dual jurisdiction are subject to the Fair Labor Standards Act until the Commission has acted. This view, we think, would be inconsistent with the duties of the Commission in its regulatory power over transportation agencies and is certainly in conflict with the decisions of the district courts which have had occasion to consider the matter in connection with this Act.

Faulkner v. Little Rock Furniture Mfg. Co., 32 F. Supp. 590;
Bechtel v. Stillwater Milling Co., 33 F. Supp. 1010;
Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 964;
Gibson v. Wilson (D. C., Tenn., 3/20/41), 4 Wage Hour Rept. 259;
Tinerella v. Des Moines Transp. Co., 41 F. Supp. 798;
West v. Smoky Mountains Stages, Inc., 40 F. Supp. 296.

In *Faulkner v. Little Rock Furniture Mfg. Co.*, supra, a driver's helper employed by a private interstate motor carrier sued for unpaid overtime compensation under the Act. The court held that there is and could be no reservation of power to the Administrator and that it had no jurisdiction until such time as the Interstate Commerce Commission saw fit to act. The court stated, at page 592:

> "In the case at bar Congress having imposed upon the Interstate Commerce Commission the duty of prescribing maximum hours of service for those in the class with the plaintiff, it has occupied the field and therefore no one but the Interstate Commerce Commission can make such regulations."

In *Bechtel, et al., v. Stillwater Milling Co., et al.*, supra, involving suit by a driver employed by a private interstate

motor carrier for unpaid overtime compensation covering a period prior to date of May 1, 1940, when the Interstate Commerce Commission took jurisdiction over hours of service for drivers employed by private carriers, the court held that the employee had no cause of action for the Act exempts employees which the Commission *has power* to regulate, and ruled that the power granted is exclusive, and that this was recognized by Congress in passing the Act, stating at page 1012 "certainly the failure of the Interstate Commerce Commission to prescribe maximum hours of service of employees does not divest the Commission of the power granted to it by Congress".

In *West v. Smoky Mountain Stages*, supra, a suit by a mechanic employed by a common interstate motor carrier, the court found for the employer, stating at pages 298-299, "The fact that the Interstate Commerce Commission may not have assumed jurisdiction over mechanics prior to this suit, is immaterial. The exemption of employees from application of the Fair Labor Standards Act is not made, by Section 13 (b) of the Act, to depend upon the exercise of power over them by the Interstate Commerce Commission, but merely upon the existence of 'power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act'."

Until the Commission's determination on March 4, 1941 as to which employees were engaged in work affecting safety, and therefore were persons subject to its power, a carrier could not know what rule would issue concerning a rate clerk or a dispatcher, nor was there any way in which Petitioner could anticipate the ultimate determination. Interpretative Bulletin No. 9 of the Administrator throws no light on the matter for he had not any jurisdiction whatsoever to hold hearings in order to establish a finding of fact relative to "safety", and any comment by

him without the benefit of facts developed at such a hearing is presumptive and lacking all foundation.

Respondent contends that the District Court could make the finding which it did The same reasoning would permit a court or the Administrator to say that a driver, helper, loader, or mechanic was subject to Section 7 until the Commission issued its finding as to "safety" employees. The necessary result is a retroactive liability covering a period of approximately two years, concerning which liability Petitioner had no warning that it should establish reserves to meet it.

It was only on March 4, 1941, when the Commission decided which employees of interstate motor carriers were engaged in activities affecting safety, that we knew which governmental agency had permanent jurisdiction over the employee in question. Until then, Petitioner contends, the Commission had sole jurisdiction, and that until that date it was only required to pay the minimum wages prescribed by Section 6, and this it has done.

The issues involve questions of national economics of far-reaching importance, with particular reference to transportation. Congress has given recognition to transportation problems in the numerous exemptions contained in Section 13. The decision of the Circuit Court would greatly impair the operating efficiency of transportation agencies if they be unnecessarily subjected to penalty overtime wages under rigid rules which may be appropriate for fixed plant operations.

Direct labor costs represent 50% of the operating expenses of common carriers by motor vehicle and the margin between operating expenses and gross income averages 3% for the nation. The undetermined potential increase in labor costs depending upon the final determination of the questions presented here, exceeds the present and past

operating margin under the rates published with the Interstate Commerce Commission. The potential cumulative retroactive wage claims, together with statutory penalties, if applied during the period of more than two years of uncertainty and conflicting decisions, would exceed the assets of the industry.

Numerous labor contracts with the American Federation of Labor are at variance with the interpretations placed on the Act by the Wage-Hour Administrator and some of the courts, and the industry is unable voluntarily to reconcile the conflicting views.

Petitioner contends that the action of the Interstate Commerce Commission, in holding hearing and determining which employees were engaged in activities affecting safety, was carrying out a legislative function implementing the Fair Labor Standards Act and therefore Section 7 cannot speak as to employees of Petitioner until after the Commission made its finding. The District Court in effect ruled in advance of the finding that the Commission could not have evidence presented to it which would be substantial and prove that a "rate clerk" had duties which affected safety. The Commission was legislating for the future; not making a judicial determination on a law already in operation.

CONCLUSION.

WHEREFORE, it is respectfully submitted that the judgment of the Court below was in error and should be reversed.

Respectfully submitted,

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March 9, 1942.

APPENDIX

STATUTORY PROVISIONS.

The pertinent statutory provisions are as follows:

FAIR LABOR STANDARDS ACT of 1938, c. 676, 52 Stat. 1060 et seq., 29 U. S. C. A. 201, et seq.:

"Finding and Declaration of Policy

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

* * * * * *

"Minimum Wages

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the

production of goods for commerce wages at the following *rates*—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour,

"(2) during the next six years from such date, not less than 30 cents an hour,

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the *rate* (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under Section 8, whichever is lower, and

"(4) at any time after the effective date of this section, not less than the *rate* (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8."

* * * * * *

"Maximum Hours

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a *rate* not less than one and one-half times the regular *rate* at which he is employed."

* * * * * *

"Wage Orders

"Sec. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum *rate* or *rates* of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage *rate* or *rates* to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage *rates* for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

"(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage *rate* (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage *rate* which

the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage *rates* for such classifications, no classification shall be made, and no minimum wage *rate* shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

"(1) competitive conditions as affected by transportation, living, and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry."

* * * * * *

"Exemptions

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); . . ."

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act."

* * * * * *

"Penalties

"Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

* * * * * *

INTERSTATE COMMERCE ACT, PART II (formerly Motor Carrier Act, 1935), c. 498, 49 Stat. 546 et seq., 49 U. S. C. A. 301, et seq.:

"General Duties and Powers of the Commission

"Sec. 204. (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.[16]

[16] Subsection (2) contains similar provision as to contract carriers.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of Sections 204(c); 205; 220; 221; 222(a), (b), (d), (f), and (g); and 224."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 939

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,

Petitioner,

versus

WILLIAM H. MISSEL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

W. HAMILTON WHITEFORD,
Counsel for Respondent.

WILLIAM O. TYDINGS,
GEORGE A. MAHONE,
Of Counsel.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

The brief of respondent, William H. Missel, respectfully represents, in opposition to the Petition for a Writ of Certiorari herein, the following:

II.

(A) That nothing in this case justifies the consideration of this Honorable Court in the matter of granting the Writ of Certiorari. The questions involved are simple, few in

number, and as shown by the record have been fully and adequately discussed, analyzed, and decided by the United States Circuit Court of Appeals for the Fourth Circuit.

(B) Respondent adopts in support of his opposition to the granting of the Writ of Certiorari said decision of the United States Circuit Court of Appeals for the Fourth Circuit rendered on January 5, 1942.

III.

The petitioner's interpretation of the Fair Labor Standards Act is one of mutilating narrowness and repugnant to the intent of said Act as expressed by the plain language thereof.

IV.

The United States Circuit Court of Appeals for the Fourth Circuit did not, as alleged by Petitioner, hold that the Fair Labor Standards Act of 1938 destroyed the private right of contract; the said Circuit Court simply interpreted the contract between Petitioner and Respondent under the provisions of the said Fair Labor Standards Act of 1938.

V.

Respondent denies that the construction of the Fair Labor Standards Act of 1938 by the United States Circuit Court of Appeals for the Fourth Circuit, and the said court's application of the provisions of that Act to Respondent, conflicts with "numerous decisions of this Court" as claimed by Petitioner. Petitioner's analogies are fallacious and not in point, especially in those instances wherein petitioner attempts to justify its legal logic in the matters of "good faith litigation", and "penalties". No penalty was imposed by the said Circuit Court, nor does Section 16 (b)

of the Fair Labor Standards Act mention the word "penalty". The Circuit Court decided that the allowance of liquidated damages, as provided by Section 16 (b) of the said Act, was mandatory.

VI.

The plain and unequivocal language of Section 16 (b), of the Fair Labor Standards Act of 1938, mandatorily provides for liquidated damages, and this legislative mandate is emphasized by the word "shall". Further, the absence of the word "willfully" in Section 16 (b), eliminates any foundation or basis for a claim that "good faith litigation" can affect the allowance of liquidated damages.

VII.

It is further submitted that the decision of the United States Circuit Court of Appeals for the Fourth Circuit in this case has ample support under the authority of this Honorable Court's decision in *The United States of America v. F. W. Darby Lumber Company and Fred W. Darby*, 312 U. S. 100, where, in the concluding portion of the opinion, under the caption "Validity of the wage and hour provisions under the Fifth Amendment" it is stated:

> "Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime 'of not less than one and one-half times the regular rate' at which the worker is employed. Since our decision in the West Hotel Co. *v.* Parrish, 300 U. S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours."

VIII.

Any alleged conflict between the Fair Labor Standards Act of 1938 and the authority of the Interstate Commerce Commission under "Part 2 of the Interstate Commerce Act", Section 204 (a), et seq., so far as Respondent is concerned, it is respectfully submitted, is disposed of by the following reasoning of Judge Coleman, District Judge, United States District Court for the District of Maryland, in this case (36 F. Supp. 980), wherein, in overruling the Motion to Dismiss, he stated, in part:

> "But we do say that there is nothing in the Supreme Court's decision (i.e., in U. S. *v.* American Trucking Association, Inc., 310 U. S. 534) that is in the least indicative of the existence of power in the Commission to say that an employee's 'activities affect the safety of operation,' when such activities as those of the plaintiff in the present case have only a most remote relation to the actual movement of motor vehicles falling under the jurisdiction of the Act. Plaintiff is a rate clerk. His duties are clerical and have no direct relation to operation, other than through the tenuous argument that since motor vehicles cannot lawfully transport goods in interstate commerce until the rates or charges for so doing have been duly established and exacted, the rate clerk, therefore, performs duties relating to operation, because there can be no operation without rates. By the same argument, almost anyone employed by a motor carrier could be said to be engaged in activities related to operation,—one who types or signs a letter relating to safety measures, or prepares or signs an accident report; even the messenger boy to whom such papers are entrusted, or indeed even the janitor or scrub woman, because these make it possible for others to occupy their offices satisfactorily and to write or transmit letters or reports."

IX.

To argue, as Petitioner does, that an employee of a motor carrier is exempted from the coverage of the Fair Labor Standards Act of 1938, by virtue of Section 13 (b) of said Act, until the Interstate Commerce Commission rules that his employment does not affect the safety of operation of motor vehicles, is a "reductio ad absurdum", which absurdity is emphasized, if there be necessity for emphasis, by considering that if the Interstate Commerce Commission never acted upon the classifications of work such as performed by Respondent, the Respondent would be denied the benefits and protection of both the "Fair Labor Standards Act of 1938" and "Part 2 of the Interstate Commerce Act"—a legal exemplification of "a Mahomet's body" suspended between the Fair Labor Standards Act and the Interstate Commerce Act, touching neither nor being entitled to the aid and benefits of neither. The Rule of Reason precludes the conclusion for which Petitioner argues.

WHEREFORE, Respondent respectfully submits that the Writ of Certiorari should be denied.

Respectfully submitted,

W. HAMILTON WHITEFORD,
Attorney for Respondent.

Of Counsel:
WILLIAM O. TYDINGS,
GEORGE A. MAHONE.
February 9, 1942.

No. 939

In the Supreme Court of the United States

OCTOBER TERM, 1941

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,
PETITIONER,

v.

WILLIAM H. MISSEL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour Division, Department of Labor, as *amicus curiae*.

OPINIONS BELOW

The opinion of the district court overruling petitioner's motion to dismiss the complaint is reported at 36 F. Supp. 980 (R. 5–15). The opinion of the district court granting judgment for petitioner on the merits is reported at 40 F. Supp. 174 (R. 27–44). The opinion of the Circuit Court of Appeals

for the Fourth Circuit, reversing the decision of the district court, is not yet reported (R. 56–78).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 5, 1942 (R. 78). The petition for writ of certiorari was granted by this Court on February 16, 1942 (R. 80). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. The respondent was employed by the petitioner at a fixed weekly salary. Section 7 of the Fair Labor Standards Act requires additional compensation for overtime "at a rate not less than one and one-half times the regular rate" of compensation. May the employer avoid paying additional compensation for overtime merely because the fixed weekly salary is in excess of the minimum wage for full time plus one and one-half times the minimum rate for overtime?

2. Whether Section 16 (b), making any employer who violates the minimum wage or overtime compensation provisions of the Act liable to the employee affected in the amount of the unpaid statutory compensation and "in an additional equal amount as liquidated damages," violates the Fifth Amendment as applied to petitioner in the circumstances of this case.

3. Whether, pursuant to Section 13 (b) (1) of the Fair Labor Standards Act, respondent, a rate clerk employed by a motor carrier, was exempt from Section 7 until a formal determination had been made by the Interstate Commerce Commission that rate clerks were not engaged in activities concerning the safety of operation and were therefore subject to the provisions of the Fair Labor Standards Act rather than to the jurisdiction of the Interstate Commerce Commission in respect to the regulation of hours of labor.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act and of the Motor Carrier Act, 1935, appear in the Appendix, *infra*, pages 24–26.

STATEMENT

Respondent instituted this suit under Section 16 (b) of the Fair Labor Standards Act to recover unpaid overtime compensation allegedly required by Section 7. The pertinent facts are stipulated (R. 17–18). Respondent was employed by petitioner, a common carrier of freight by motor truck, in the capacity of rate clerk and office employee from November 26, 1937, to October 19, 1940, and in the discharge of his duties he was engaged "in commerce" (R. 17–18). Until October 31, 1938, respondent received $25.50 a week and thereafter $27.50. He worked a varying number of hours

from week to week, including, during the period after the Act became effective, at least two work-weeks of 80 hours and at least three other work-weeks of 75 hours (R. 18).

Petitioner's motion to dismiss the complaint, on the ground that Section 7 could not apply to respondent prior to a determination by the Interstate Commerce Commission that his hours of work could not be regulated under the Motor Carrier Act, was denied by the District Court (R. 5–15). Thereafter the court found that, since the employee's weekly compensation was at least equal to the statutory minimum rate for the statutory work-week plus one and one-half times that rate for the overtime hours, there was no violation of Section 7 and entered judgment for the employer (R. 27–44). The Circuit Court of Appeals reversed (R. 78–79), holding that the employee was entitled to additional compensation for his overtime hours at one and one-half times his regular rate of pay and that the regular rate was determined for each week by dividing the weekly salary by the number of hours worked.

SUMMARY OF ARGUMENT

1. Petitioner employed respondent at a fixed weekly wage and contends that it need not pay any additional compensation for overtime under Section 7 of the Fair Labor Standards Act, since the weekly wage exceeded the statutory minimum wage for full time plus one and one-half times the

minimum rate for overtime. That petitioner has misconceived the scope of Section 7 is shown by the Administrator's brief in *Walling* v. *A. H. Belo Corp.*, No. 622, to be argued immediately preceding this case. Indeed, the result there urged by the Administrator follows *a fortiori* in this case since the employer had not here taken the further step of attempting to establish new "rates" by contract in an effort to circumvent the statute.

2. Since the employee was awarded not only overtime compensation but also "an additional equal amount as liquidated damages" under Section 16 (b), the petitioner contends that it was denied due process. Its contention is based upon the fact that Section 13 (b) (1) exempts employees who are subject to the maximum hours provisions of the Motor Carrier Act, 1935, and that the wages involved herein relate to a period of employment prior to the final determination of the Interstate Commerce Commission that this employee was not subject to those provisions of the Motor Carrier Act.

Although petitioner, through its trade association, chose to contest the question of the applicability of the Motor Carrier Act, the position of the Commission and the ultimate result were plainly forecast before the period for which recovery was allowed herein. Even if the result were less clear, the provision for double damages is valid as applied during the period in which the applica-

tion of the statute was being contested. Section 16 (b) was patterned after the treble damage provision of the Sherman Act, and it has never been supposed that those provisions violated due process when applied to a defendant who in good faith contested the application of the Sherman Act to his particular business arrangement. Moreover, the constitutional question is foreclosed by *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 68–69, and even if the double damage provisions were penal rather than compensatory in character, they would nevertheless be valid. Cf. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 348.

3. Nor is there any foundation for petitioner's related contention that Section 7 itself did not become operative with respect to respondent until after the Interstate Commerce Commission had made a final determination of the employee's status. Subsection (d) of Section 7 itself expressly states that "This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act." No exception is spelled out for employees whose status might be uncertain by reason of Section 13 (b) (1), and none can be inferred. Indeed, if the application of Section 7 were suspended until the Interstate Commerce Commission had acted with respect to each employee or each type of employee, certain employees might be permanently denied the benefits of Section 7 by default on part of the Commission,

since there is nothing in the Fair Labor Standards Act to require the Commission to assume jurisdiction in this situation.

I

THE COURT BELOW PROPERLY CONSTRUED THE "REGULAR RATE" WITHIN THE MEANING OF SECTION 7 (a)

Petitioner contends that the overtime compensation provisions of Section 7 do not apply at all where the employee's total weekly compensation equals at least the statutory minimum wage established by Section 6 for straight time and time and one-half that minimum for the overtime hours. This contention is based upon the view that Congress intended "through Section 7 to establish minimum overtime wages for the same class of employees covered by Section 6" (Br. 9); petitioner insists that the Act is confined in purpose to the regulation of wages and is not concerned with the regulation of hours.[1]

In the brief filed on behalf of the Administrator in *Walling* v. *A. H. Belo Corp.*, No. 622, to be argued immediately preceding the present case, the purposes and meaning of Section 7 are fully dis-

[1] In support of this construction, petitioner urges that a contrary interpretation "raises serious doubts as to the constitutionality" of Section 7 (Br. 12, 20). The validity of Section 7 as a conditional regulation of hours raises no constitutional question not heretofore settled by decisions of this Court. *United States* v. *Darby*, 312 U. S. 100, 125, and cases there cited.

cussed and it is demonstrated that Congress sought to regulate hours as well as wages (pp. 14–30). Petitioner's own incomplete review of the legislative history (Br. 16–19), far from showing anything to the contrary, strengthens that conclusion. The court below, in approving the consistent [2] administrative interpretation of Section 7, exhaustively reviewed the pertinent authorities (R. 56–78).

The facts herein differ from those presented in the *Belo* case in that there was no attempt here by contract to set the "regular rate" at some figure other than the actual rate of compensation. The case is therefore one of that category (see *Belo* brief, note 48, pp. 39–40) in which the employee's

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[2] Petitioner relies (Br. 27) upon an informal remark made by former Administrator Andrews at an open forum discussion to show an inconsistency in administrative interpretation. That remark was not free from ambiguity and should be considered in the light of the fact that on October 21, 1938, before the Act became effective, Mr. Andrews released Interpretative Bulletin No. 4, containing the considered opinion of the Administrator and his General Counsel that "regular rate" means the employees' actual hourly rate and not the statutory minimum. There has been no deviation from this interpretation. (*Belo* brief, pp. 19–20.) The opinion of an Assistant Solicitor of the Wage and Hour Division, referred to by petitioner (Br. 28), is in no way inconsistent with the Administrator's view. The portion quoted by petitioner merely explains the method of determining the regular rate of pay where an employee is employed *at a fixed weekly salary for a fixed number of hours.* In such cases, of course, the contract in effect sets a specific and unvarying hourly rate, and the courts have so held. (*Belo* brief, note 13, p. 16.)

compensation can be deemed to be in compliance with the Act only if the Court will infer an agreement distributing the weekly salary between straight-time and overtime in such proportions that the rate for overtime hours will be one and one-half times the rate for straight time hours. To indulge in such arithmetical manipulation by inference would result in a distortion of the employment contract. And it would approach absurdity where, as here, the contract of employment was made before the Act became effective, and where, since respondent worked a varying number of hours for a fixed salary, there would have to be an implied automatic adjustment of the employment contract each week.

II

THE AWARD OF "DOUBLE DAMAGES" WAS CONSISTENT WITH DUE PROCESS OF LAW

Petitioner contends that the award of double damages constituted a denial of due process in the circumstances of this case. These additional damages were mandatory[3] under the statute since Section 16 (b) (*infra*, pp. 24–25), which authorizes an employee to maintain suit for recovery of his unpaid minimum wages or unpaid overtime compensation, provides that the employer shall be liable for "an additional equal amount as liquidated damages."

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[3] See the cases collected in the opinion of the court below, R. 77–78.

In substance, petitioner contends that the award of double damages here is inconsistent with due process since the violations occurred during a period when it could not be certain that respondent's employment was governed by Section 7. The alleged uncertainty stemmed from Section 13 (b) (1) (*infra*, p. 24), which excepts from Section 7 "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935 * * *." Petitioner claims that prior to a specific finding by the Commission that rate clerks were not within the scope of Section 204, petitioner was "in a twilight zone relative to jurisdiction under the two Acts" and could in no way "anticipate the ultimate determination" (Br. 49, 57). Since a specific determination was not made by the Commission until March 4, 1941,[4] and since respondent's employment ended prior to that date, petitioner contends that coverage was uncertain during the entire period for which recovery, including "double damages," was allowed.

1. But some ten months prior to October 24, 1938, the effective date of Section 7, and therefore prior

[4] *Ex parte* MC–2 and MC–3, 28 M. C. C. 125. The Commission held that all employees of common, contract, and private carriers other than drivers, mechanics, loaders, and drivers' helpers, performed duties which did not affect the safety of operation of motor vehicles and were not, therefore, subject to the Commission's power under Section 204.

to the accrual of any liability herein, it was exceedingly clear that, so far as the Commission was concerned, employees such as respondent were not subject to Section 204. On December 29, 1937, the Commission fixed a maximum workweek for drivers and specifically held that "until the Congress shall have given us a more particular and definite command in the premises, we shall limit our regulations concerning maximum hours of service to those employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations."[5] On March 25, 1939, the Administrator of the Wage and Hour Division advised employers that Section 13 (b) (1) of the Fair Labor Standards Act exempted only those employees of common and contract motor carriers whose duties affected safety of operation.[6] On May 9, 1939, and June 15, 1939, the Commission reaffirmed its prior ruling concerning the scope of Section 204.[7] Thus the Commission had "three times concluded that its authority was limited to securing safety of operation." *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549. However, in its decision of May 9, 1939, the Commission left open the question whether any employees other than drivers came within the announced

[5] *Ex parte* MC–2, 3 M. C. C. 665, 667.

[6] Interpretative Bulletin No. 9. The nature of these bulletins is discussed in the *Belo* brief, note 17, p. 19.

[7] *Ex parte* No. MC–28, 13 M. C. 481, 488; No. MC–C–139, 16 M. C. C. 497.

limits of regulation;[8] it is this circumstance which affords the entire ground for petitioner's assertion that prior to March 4, 1941, it had no means of determining whether respondent was an employee whose activities affected safety of operation.

It was at all times clear that respondent did not come within the statutory test laid down by the Commission. He was a rate clerk engaged in applying proper tariffs to various classifications of freight, collecting and accounting for freight revenues, disbursing expense money to employees, and "dispatching" trucks when the chief dispatcher was absent from duty (R. 17–18).[9] Clerical duties

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[8] 13 M. C. 481, 488.

[9] The District Court found that respondent's "duties are clerical and have no direct relation to operation, other than through the tenuous argument that since motor vehicles cannot lawfully transport goods in interstate commerce until the rates or charges for so doing have been duly established and exacted, the rate clerk, therefore, performs duties relating to operation, because there can be no operation without rates" (R. 12). Without taking issue with the proposition that it was at all times obvious that a rate clerk's duties did not affect safety of operations, petitioner emphasizes the fact that one of respondent's duties was "the dispatching of trucks" (Br. 47). The record does not indicate what this function consisted of, and respondent's elaboration of the duties, outside the record (*ibid.*), establishes at most an indirect and weak relation to safety of operation. In its decision of March 4, 1941, *supra*, the Commission pointed out that "The average carrier operating a small number of vehicles has the dispatching done as an incident to other work. It may be done by the owner, by a driver, or by a clerk. * * * errors of judgment (on the part of dispatchers) are not the proximate causes of such accidents, and * * *

of this kind could not possibly affect the safety of operation and petitioner may not contend with any justification that until the Commission's decision of March 4, 1941, the applicability of Section 7 was in substantial doubt.

2. Respondent is on no firmer ground in seeking to avoid "double damages" during the more limited period terminating May 27, 1940, when this Court rejected, in litigation conducted by petitioner's trade association, the contention that under Section 204 the Commission was required to prescribe maximum hours of employment for all employees of common and contract motor carriers. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534. Petitioner, of course, had the right to challenge in the courts the validity of the statutory construction enunciated by the two administrative agencies concerned. But such right of review plainly did not include a concomitant power to avoid, during exercise of the right, a remedial provision designed to compensate those who suffered by reason of petitioner's continued violations.

Section 16 (b) of the Fair Labor Standards Act is modelled after Section 7 of the Sherman Act (Act of July 7, 1890, c. 647, 26 Stat. 209, 210),

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the dispatchers engage in no activities which directly affect the safety of operation * * *." 28 M. C. C. 125, at 135. In any event, it is apparent from the stipulation that respondent "dispatched" trucks only in the absence of the chief dispatcher and that respondent's principal duties were entirely clerical in nature (R. 17–18).

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which provides that any person injured in his business by the proscribed practices may bring suit in the federal district court "and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." Under this provision the plaintiff "is given a remedy for his losses in treble damages." *United States* v. *Cooper Corp.*, 312 U. S. 600, 608. The legislative intent, plainly, is to award some measure of compensation other than provable damages to victims of transgressions against announced social policy. Cf. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 396–397.[10] And it has never been supposed, through years of extensive interpretation, that the treble damages provision vio-

[10] The lower Federal courts have recognized the compensatory, rather than penal, character of Section 7 of the Sherman Act in cases involving an inquiry into the applicable statute of limitations (*City of Atlanta* v. *Chattanooga Foundry*, 101 Fed. 900 (C. C. E. D. Tenn., reversed on other grounds, 127 Fed. 23 (C. C. A. 6th), affirmed, 203 U. S. 390; *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364, 367 S. D. N. Y.); *Jones & Co.* v. *West Publishing Co.*, 270 Fed. 563, 566 (C. C. A. 5th); *Shelton Electric Co.* v. *Victor Talking Mach. Co.*, 277 Fed. 433 (N. J.)) and in cases involving the question whether the right to sue under Section 7 survives death (*Sullivan v. Associated Billposters, etc.*, 6 F. (2d) 1000, 1009 C. C. A. 2d); *Imperial Film Exch.* v. *General Film Co.*, 244 Fed. 985 (S. D. N. Y.); *Moore* v. *Backus*, 78 F. (2d) 571 (C. C. A. 7th); *Baush Machine Tool Co.* v. *Aluminum Co.*, 63 F. (2d) 778 (C. C. A. 2d), certiorari denied, 289 U. S. 739). The cases are collected and examined in Vold, *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 Ky. L. J. 117–159. See also *Right of the United States to Sue for Treble Damages*, 89 U. of Pa. L. Rev. 243–245, fn. 10.

lated constitutional guarantees when applied to a defendant who, in the utmost good faith, consistently maintained during the course of extended litigation that his particular business arrangement did not offend the statutory prohibitions.

The constitutional question is, we submit, foreclosed by *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, where a state statute making it unlawful to cut timber on state lands without a valid permit provided treble damages if the offense was willful and double damages if it was not. Upon finding that the defendant "had reasonable ground for believing authority had been granted and honestly acted on such belief," the State court awarded double damages. This Court rejected the contention that, as thus applied, the statute was invalid under the due process clause (pp. 68–69):

> * * * innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse. The law in controversy has no *ex post facto* element or effect in it. It was existing law when the trespass of plaintiffs in error was committed, and a trespass is a legal wrong, not an innocent act. There is no element of deception or surprise in the law. When the permit was issued plaintiffs in error knew the limitations of it, and they took it at the risk and consequences of transgression * * *.

The State courts and lower federal courts have almost uniformly held that the liquidated damages

provision of Section 16 (b) of the Fair Labor Standards Act is compensatory rather than penal in nature.[11] Since it is apparent that employees do suffer injury from failure by employers to comply with the modest standards imposed by the Act,[12] there would appear to be little justification for

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[11] One line of cases holds that the "double damages" do not constitute a penalty incurred under the laws of the United States within the meaning of Sections 24 (9) and 256 of the Judicial Code (28 U. S. C. secs. 41 (9) and 371). *Robertson* v. *Argus Hosiery Mills*, 121 F. (2d) 285, 286 (C. C. A. 6th), certiorari denied, No. 638, present term; *Stewart* v. *Hickman*, 36 F. Supp. 861 (W. D. Mo.); *Kuligowski* v. *Hart*, 4 Wage Hour Rept. 203 (N. D. Ohio); *Wingate* v. *General Auto Parts Co.*, 40 F. Supp. 364 (W. D. Mo.); *Barron* v. *F. H. E. Oil* Co., 4 Wage Hour Rept. 551 (W. D. Tex.); *Hart* v. *Gregory*, 218 N. C. 184, 10 S. E. (2d) 644; *Forsyth* v. *Central Foundry Co.*, 240 Ala. 277, 198 So. 706; *Graves* v. *Armstrong Creamery Co.*, 154 Kans. 365, 118 P. (2d) 613; *Emerson* v. *Mary Lincoln Candies*, 173 Misc. 531, affirmed 261 App. Div. 879, affirmed, 287 N. Y. 3[illegible] N. E. (2d) 234; *Abroe* v. *Lindsay Bros. Co.*, 300 N. W. 456 (S. Ct. Minn.); *Tapp* v. *Price-Bass Co.*, 147 S. W. (2d) 107 (S. Ct. Tenn.); *Duke* v. *Helena-Glendale Ferry Co.*, 5 Wage Hour Rept. 206 (S. Ct. Ark.); *Dennis* v. *Equitable Equipment Co.*, decided March 16, 1942 (Ct. App. La.); *Adair* v. *Traco Division*, 192 Ga. 59, 14 S. E. (2d) 466. The *Adair* case overruled *Anderson* v. *Meacham*, 62 Ga. App. 145, one of the two decisions upon which petition relies (Br. 43–44). The other line of cases holding Section 16 (b) to be remedial rather than penal involves determination of the applicable statute of limitations. *Collins* v. *Hancock*, 4 Wage Hour Rept. 522 (D. La. Caddo Parish); *Tucker* v. *Hitchcock*, No. 370, S. D. Fla., Oct. 2, 1941; *Klotz* v. *Ippolito*, 40 F. Supp. 422 (S. D. Texas).

[12] Compare the Congressional finding, in Section 2 (a), that there exist "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health efficiency, and general well-being of workers * * *."

going behind the deliberate designation of the additional amount as "liquidated damages" (see *Robertson* v. *Argus Hosiery Mills*, 121 F. (2d) 285, 286 (C. C. A. 6th), certiorari denied, No. 638, present Term) or for assuming that the employee's injury is fully compensated by mere repayment of the compensation earned but wrongfully withheld. Congress could find, as it did, that a remedy so restricted would be inadequate as well as late.

3. Moreover, even if the double damages provision be regarded as punitive rather than remedial, petitioner's objection on constitutional grounds is nevertheless not well taken. Criminal sanctions and fines so substantial as to nullify, in practical effect, the right to judicial review may be invalid.[13] But the test is one of degree and a penalty which violates constitutional guarantees is one "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression." See *Life & Casualty Co.* v. *McCray*, 291 U. S. 566, 571. "Double damages" are plainly not in this category. *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512; *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Kansas City Southern Ry. Co.* v. *Anderson*,

[13] See *Ex parte Young*, 209 U. S. 123 (penalty of $5,000 fine or up to five years in prison, or both, for charging railroad rates in excess of the statutory maximum); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (penalty up to $500 per day for refusal to obey administrative order setting maximum laundering rates); *Natural Gas Co.* v. *Slattery*, 302 U. S. 300 (penalties of $500 to $2,000 per day for failure to comply with administrative order to produce records). But cf. *United States* v. *Clyde Steamship Co.*, 36 F. (2d) 691

233 U. S. 325. Cf. *Seaboard Air Line Ry.* v. *Seegers*, 207 U. S. 73; *Yazoo & Miss. Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. In striking down an award of $500 "liquidated damages" where the actual damage inflicted by an excess rate charge totalled $3.02, this Court said (*Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 348):

> It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here * * *.

III

SECTION 7 APPLIED TO RESPONDENT DURING THE PERIOD COVERED BY THE JUDGMENT

Upon the same factual basis as it challenges the award of double damages under Section 16 (b) (*supra*, pp. 9–13), petitioner seeks to avoid all obligation to comply with Section 7 prior to determination by the Interstate Commerce Commission, on March 4, 1941, that the activities of rate clerks did not affect safety of operation (Br. 51–59). While petitioner invokes the "primary jurisdiction" doctrine (*Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426) in contending that Section 7 did not become operative with respect to respondent until such a determination was made, it is plain

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(C. C. A. 2d), certiorari denied, 281 U. S. 744 (penalty of $500 a day for refusal to submit records for inspection by the Interstate Commerce Commission held valid).

that that doctrine is not involved here. The "primary jurisdiction" rule goes to the respective jurisdictions of the courts and the administrative agency; it is concerned with the question of which forum is appropriate procedurally and not with the curtailment or abridgement of substantive rights. See *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 290. Although petitioner's motion to dismiss the complaint asserted a lack of jurisdiction in the District Court because the Commission had not yet made a determination with respect to rate clerks (see R. 12–15), such a determination was made prior to the joinder of issue (R. 15) and any question concerning the District Court's jurisdiction thereupon became moot, as petitioner concedes (Br. 53).[14]

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[14] Moreover, the "primary jurisdiction" doctrine relates to such questions as "complex transportation problems that must be solved as a prerequisite to a determination" of the legal rights and liabilities involved (*Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 200); its applicability turns upon "the character of the controverted question and the nature of the enquiry necessary for its solution. * * * Preliminary resort to the Commission is required * * * because the enquiry is essentially one of fact and of discretion in technical matters * * *." *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. The sole inquiry in the present case was whether the activities of a rate clerk affected safety of operations within the meaning of prior decisions of the Commission and the decision of this Court in *United States* v. *American Trucking Ass'ns*, 310 U. S. 534; that issue did not require preliminary application of an expert judgment (*supra*, pp. 12–13). See *Faulkner* v. *Little Rock Furniture Mfg. Co.*, 32 F. Supp. 590, 591 (E. D. Ark. 1940); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742,

The clear import of petitioner's contention is that, as a matter of statutory construction, Section 7 did not become operative with respect to any employees of motor carriers until the Commission legislated them piecemeal into the scope of Section 7 by determining that their functions did not bring them within Section 204 of the Motor Carrier Act (Br. 54, 55). But Section 7 (d) expressly provides that the provisions of Section 7 "shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act" with respect to "any" employee "who is engaged in commerce or in the production of goods for commerce." Nor do any terms of the exemption stated in Section 13 (b) (1) support petitioner's view that Congress intended to suspend operation of Section 7 for an indeterminate period as to all employees of motor carriers, including those who are in fact not within the terms of the exemption. Section 13 (b) (1) refers only to employees with respect to whom the Commission has "power" to prescribe maximum hours; since the Motor Carrier Act provides

749–750 (W. D. Va.); *West* v. *Smoky Mountain Stages*, 40 F. Supp. 296, 296, 298 (N. D. Ga.); *Gavril* v. *Kraft Cheese Co.*, 4 Wage Hour Rept. 682, 683 (N. D. Ill.); *Thompson* v. *Daugherty*, 40 F. Supp. 279, 283 (D. Md.); *Neuwirth* v. *Kafer*, 176 Misc. 864 (City Ct. N. Y. 1941); *Gibson* v. *Glasgow*, 157 S. W. (2d) 814, 816–817 (Tenn. Sup. Ct., 1942); Note (1942) 55 Harvard L. Rev. 537–538. *Contra: Wonham* v. *Pennsylvania Greyhound Lines*, 4 Wage Hour Rept. 218 (E. D. Pa. 1941). The question is also discussed in the opinion of the District Court denying petitioner's motion to dismiss the complaint herein (R. 5–15).

no procedure for piecemeal delimitation of its power by the Commission, it does not appear that Congress contemplated different effective dates for various classes of employees, contrary to the express terms of Section 7. Indeed, since neither statute requires a determination by the Commission concerning the extent of its power, petitioner necessarily contends that certain employees might, by default on the part of the Commission, remain permanently outside the scope of Section 7.[15]

The cases cited by petitioner (Br. 56–57) hold merely that when an employee is in fact subject to the power of the Commission, the exemption granted by Section 13 (b) (1) applies whether or not the Commission has exercised its power by pre-

[15] Since there are no provisions requiring the Interstate Commerce Commission to assume jurisdiction, the situation here is to be contrasted with the analogous problem raised by the Railway Labor Act and Carriers Taxing Act which authorize the Mediation Board or the Commissioner of Internal Revenue or any interested party to invoke the jurisdiction of the Interstate Commerce Commission for the purpose of determining whether a particular carrier is a "street, interurban, or suburban electric railway" which is excepted from the operation of those statutes. See U. S. C., Title 45, Sec. 151; U. S. C., Title 26, Sec. 1532 (a). Moreover, petitioner errs in its unsupported assertion (Br. 54–55) that a determination by the Interstate Commerce Commission is essential prior to the effective operation of the Railway Labor Act and the Carriers Taxing Act with respect to carriers seeking exemption under the foregoing provisions. Administrative practice has been to the contrary, and, particularly in the case of the Carriers Taxing Act, the determination of the Interstate Commerce Commission is regarded merely as declaring the status that has existed theretofore.

scribing maximum hours.[16] The rationale of those decisions is that the application of Section 7 expressly turns upon the existence of the power. It is a necessary corollary that if the power is in fact absent, Section 7 applies as of the effective date therein stated.

In accordance with well-established principles, an exception to a remedial statute of general scope and embodying a broad legislative policy must be strictly construed; the burden is upon the one who seeks to take himself out of the sweep of the Act to demonstrate that he is within the granted exemption.[17] Doubtless, Congress contemplated that in the operation of Section 13 (b) (1) the power of the Interstate Commerce Commission over particular groups of employees would become a contested issue in proceedings under the Act. But what Congress could not have intended is that a litigant, having advanced his claim to exemption and the claim having been authoritatively rejected (here by both the Commission and the

[16] Believing that Congress did not intend that the hours of employees should be uncontrolled under either statute, the Administrator had expressed the opinion that the exemption did not become applicable, as to employees who were in fact subject to the power of the Commission, until the Commission had actually established maximum hours. Interpretative Bulletin No. 9, issued March 9, 1939. This position was abandoned in the fourth revision of the bulletin, March, 1942.

[17] *Bowie* v. *Gonzales*, 117 F. (2d) 11, 16 (C. C. A. 1); *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8); *cf. United States* v. *Dickson*, 15 Pet. 141, 165.

courts), should nevertheless enjoy the exemption, to the detriment of those for whose benefit the statute was enacted.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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MARCH 1942.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201, *et seq.*):

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this act.

* * * * *

SEC. 13 (b) (1). The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *

* * * * *

SEC. 16. * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Motor Carrier Act, 1935, c. 498, 49 Stat. 543 (49 U. S. C., sec. 301, *et seq.*):

SEC. 204 (a). It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uni-

form systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment * * *.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 939.

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,
Petitioner,

v.

WILLIAM H. MISSEL, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

BRIEF OF
AMERICAN TRUCKING ASSOCIATIONS, INC., AMICUS CURIAE

J. NINIAN BEALL,
Attorney.

1424 16th St., N. W.,
Washington, D. C.
March 31, 1942.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF
AMERICAN TRUCKING ASSOCIATIONS, INC., AMICUS CURIAE

INTRODUCTION

Consent of the parties having first been obtained and duly filed with the Clerk, the American Trucking Associations, Inc., submits this brief as *Amicus Curiae.*

The American Trucking Associations, Inc., is the national trade association of the for-hire carriers of property in the motor transportation industry. It appeared on behalf of the industry before the Congressional Committees, represented the industry in connection with these issues, in all

proceedings before the Interstate Commerce Commission, and was party to the principal litigation before the courts involving the Fair Labor Standards Act and the jurisdiction of the Interstate Commerce Commission.

This case concerns the interpretation of the Fair Labor Standards Act (29 U. S. C. A. 201, *et seq*), particularly Sec. 7 covering minimum wages for overtime. Construction of the statute involves ascertainment of the intent of Congress. The precise question is whether the classes of employees and wage earners covered by Sec. 7 are co-extensive with, and limited to, those protected by Sec. 6 covering straight time minimum wages, or whether Sec. 7 covers all classes of employees and all wages, regardless of the limitations in Sec. 6.

Other issues concern construction of wage agreements and consideration of administrative procedure and prior litigation. As the administrative procedure and litigation were handled by the American Trucking Associations, Inc., on behalf of the industry as a whole and as representative of a class, it appeared to be appropriate that the Association participate in this case as *Amicus Curiae*.

POINTS AND SPECIFICATION OF ERRORS

The points and assignment of errors as set forth in the brief of Petitioner (Overnight Motor Transportation Co., Inc.) are adopted for the purposes of this brief and are repeated with comments for convenient reference.

I

The scope of Section 7 (maximum hours) is limited, and is restricted to the classes of employees covered by Section 6 (minimum wages). This interpretation is consistent with the provisions of the Act and is supported by the legislative history of the Act.

Specification of Errors: The Court below erred in holding that the scope of Section 7 (maximum hours) was un-

limited, and was not restricted to the classes of employees covered by Section 6 (minimum wages).

The Court erred in adopting a construction of the Act which is at variance with the intent of Congress.

Comment: This point is applicable to all industries covered by the Act.

II

The private right of contract is not destroyed by the Act, but is merely restricted by a minimum wage floor below which employer and employee may not contract. Petitioner is entitled to the usual and ordinary presumption that the parties contemplated compliance with the law in their over-all contract.

Specification of Errors: The Court below erred in holding that the Act destroyed the private right of contract, instead of construing the Act as having the effect of placing a minimum wage floor below which employer and employee may not contract.

The Court also erred in applying a novel legal presumption that the total contract wage was not intended to, and did not, include overtime pay at a penalty rate, thereby rejecting the usual and ordinary presumption that parties contemplate compliance with the law in their over-all contract.

Comment: This point is applicable to all industries, but is particularly important to this transportation industry because its competitors are exempt from the overtime wage provisions and because the nature of its operations, like all other transportation industries, necessitates a large percentage of guaranteed weekly or monthly income for indefinite hours.

III

The double penalty provisions of Section 16, and the overtime pay provisions of Section 7 in the nature of a penalty, are discretionary with and not mandatory upon the courts in cases of good faith litigation, and a ruling that they are mandatory deprives Petitioner of the protection of the "due process" provisions of the Constitution.

Specification of Errors: The Court below erred in ruling that the double penalty provisions in Section 16 were mandatory upon and not discretionary with the courts. The Court also erred in disregarding Petitioner's contention that the overtime rates provided by Section 7 were in the nature of a penalty. The imposition of these penalties, regardless of the fact of good faith litigation, deprived Petitioner of the protection of the "due process" provisions of the Constitution.

Comment: This point is applicable to all industries subject to the Act but is particularly important to this industry because it is the only industry subject to the dual jurisdiction of separate governmental agencies, and the infliction of penalties which arise because of conflicting administrative jurisdiction is repugnant to "due process" of law.

IV

The Act imposes a legislative function to be performed by the Interstate Commerce Commission for the purpose of implementing the scope of Section 7, and prior determination of facts by the Commission is a prerequisite, under the primary-jurisdiction rule, to action by the courts.

Specification of Errors: The Court below erred in failing to determine the issues which were duly raised in the pleadings, and argued, with respect to the legislative function imposed by the Act upon the Interstate Commerce Commission by reason of Sec. 13(b), which was prerequisite in determining the scope of Sec. 7 and which implemented that section. The Court erred in ignoring the fact

that during the period involved in this suit the prerequisite determination by the Commission under the primary-jurisdiction rule had not been made.

Comment: This point applies exclusively to this transportation industry because it is the only industry subject to jurisdiction divided between two governmental agencies; it is the only industry with respect to which part of its general employees are subject to the overtime wage provisions and part are exempt; and, it is the only industry dependent upon action by an independent agency to determine first the classes of employees which affect safety, which, in turn, implements the Fair Labor Standards Act and fixes the coverage of the overtime wage provisions. The decision of the Court of Appeals appears to allow the recovery of both penalty wages and penalty damages, retroactively, over a period of years, during which time, the industry was helpless with respect to determining the coverage of the law.

STATEMENT OF THE CASE

The factual statement of this case as it involves the particular employer and employee, was set out in full in the brief of Petitioner, Overnight Motor Transportation Company, Inc. As this is a brief on behalf of the industry generally, it is desirable to summarize and re-state the case to reflect the facts and issues as they bear upon large classes of employees and the national importance of the questions. We are not unmindful of the need for respect for the Record, but to the extent that undisputed matters of general importance are necessary to illustrate the setting of the questions, we have ventured to supply them.

These factual statements relate to all of the questions in the case. In stating the facts and in making the arguments, we have not lost sight of the distinction between that which may be addressed to this Court and that which should be addressed to Congress. Our purpose is solely to supply the facts which breathe life into the dead words of the law which is now before the Court for construction.

Fact No. 1: The employee (Respondent), like many thousands of other employees of the industry, was paid on a lump sum weekly basis and the lump sum salary exceeded the minimum wage for straight time prescribed by Sec. 6, and also exceeded one and one-half times the Sec. 6 straight time minimum wage for all overtime hours worked or on duty under Sec. 7.

Fact No. 2: The employee (Respondent), like many thousands of similar employees in the industry, was employed for an indefinite number of hours to accomplish certain results which were necessary in the relations of a common carrier with the public.

Fact No. 3: The agreement and working arrangements represented a custom and necessity which existed because of the nature of the operations and the character of the service rendered to the public by the industry. The employee made his own determination with respect to responsibilities which involved overtime as reflected in varying number of hours worked or on duty or responsibility for work. (The duties of "white collar" terminal men are stated in the argument.)

Fact No. 4: During the period covered by this suit, no question was ever raised by either employer or employee with respect to voluntary adjustment of the contract or reformation of the contract by operation of law; for the reasons that, first the contract appeared to meet the wage requirements of the law; and, second, the nature of the employment did not lend itself to a mathematical breakdown between hours worked, hours on duty, and hours responsible for results.

Fact No. 5: The weekly or monthly employment agreement provided an aggregate amount in excess of statutory minimum wages and in excess of overtime computed on that basis, and theoretically it could have been fictitiously re-stated on the basis of minimum straight time wages and minimum overtime wages prescribed by the statute. There-

fore, the issues respecting contract were matters of *form* and *not of substance*. But these employment arrangements were not re-stated because that would have destroyed the certainty of income for the employee and might have resulted in lower aggregate compensation, and would have involved the impractical problem of distinguishing between hours worked, hours on duty and hours responsible for results.

The period covered by employee's (Respondent's) claims was the identical period during which the industry was pursuing diligently every administrative and legal means to have the issues determined and the Interstate Commerce Commission was holding many hearings in connection with the subject and for the purpose of implementing the law.

Fact No. 6: The duties of the employee (Respondent), like many thousands of other employees of the industry, were, to a large extent, of the kind usually performed by administrative employees and minor executives, and if he was an administrative employee or executive, he was exempt under Section 13(a) from both the minimum wage and maximum hour provisions of the Fair Labor Standards Act. These employees have many duties related to safety and are required to comply with many safety regulations issued by the Interstate Commerce Commission, and the legal effect of such duties was undetermined during the period of employment of this particular employee. (Explained in the argument.)

Fact No. 7: The operating ratio (expenses to gross income) of the industry is approximately 95 and approximately 50 per cent of the expense is represented by labor costs, and, in view of the regulation of charges by public authority, as well as by competitive considerations, it is not possible to resolve all doubtful issues respecting interpretations of the Fair Labor Standards Act and the classes of employees possibly involved, by making voluntary payments.

This public service industry could not increase its charges to the public in anticipation of a contingent liability and it could not rebate charges it collected in the event the liability did not materialize. Neither could it pay employees and then recover from them on the theory of mistake of law.

There is no provision in the law for the placing of funds in escrow and such action would not have been effective to foreclose either employee suits or the imposition of penalties.

Fact No. 8: The principal American Federation of Labor union with which this industry has many employment agreements has not accepted and adopted the views and informal interpretations of the Administrator of the Fair Labor Standards Act and many of the existing agreements with it which are binding contracts on this industry are inconsistent with the Administrator's views in connection with many classes of employees.

Fact No. 9: The industry knew that when this legislation was being considered by Congress it appeared before Congressional Committees and while never asking for exemption, it did ask that the bill be amended to accord it equal treatment with its competitors. Its competitors were exempted from the overtime provisions, and amendments were made, the literal terms of which did accord equality of treatment to this industry and would have exempted it from the overtime wage provisions, and it was not until this Court decided the case of *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, that the industry became aware of a different result.

ARGUMENT

I

The Scope of Section 7 (Maximum Hours) is Limited, and is Restricted to the Classes of Employees Covered by Section 6 (Minimum Wages). This Interpretation is Consistent With the Provisions of the Act and is Supported by the Legislative History of the Act.

At the outset it should be emphasized that this case arises, not because the employer paid less than the minimum wage provided by Section 6, or because the employer paid less for overtime under Section 7, than one and one-half times the minimum wages prescribed by Section 6, but solely because the employer paid a lump sum wage which was more than minimum wages under Section 6 and more than one and one-half times the Section 6 minimum wage for overtime under Section 7. Therefore, we have the anomalous situation of a judgment for wages and penalties for having paid more than was was necessary.

The construction contended for by Respondent has the quality of converting statutory provisions which are clearly beneficial to a large group of poorly paid employees, into an instrument of oppression for those same employees. The statute, Section 6, fixes minimum wages and no one should contend for construction that necessarily tends to discourage the payment of better wages. Respondent's position is, that if the employer pays better than the minimum wages provided by Sec. 6, the employer must be penalized under Sec. 7 in direct proportion to any voluntary increases in wages over those provided in Sec. 6. Certainly such a construction would tend to discourage an employer from paying in excess of the minimum wages and operate to reduce the total earnings of the employee.

When Congress considered this legislation, it was clear that the worst substandard wages and living conditions were the only objects of the law. Those substandard conditions did not prevail among the organized workers whose

straight time and overtime were arrived at through collective bargaining. Those conditions were not found among the white collar workers who possessed a considerable degree of individual bargaining power, regardless of organization. The evil which Congress struck at affected the worker with practically no bargaining power. Congress knew that there were two or more such workers for every job and that their competition for employment forced wages, in many places and in many industries, to substandard levels, and thereby burdened interstate commerce.

Respondent contends that Congress intended to compel all employers to pay overtime wages at penalty rates, regardless of the salary or hourly rate of pay. It is argued that Congress wanted to establish a universal 40-hour week and believed that anything over 40 hours was a substandard work week and should be discouraged through the device of penalty wages. That may possibly be an ideal social objective which Congress may consider some day, but the objective presented by this case is, what did Congress do in this initial social act, not what Congress might have done, assuming the absence of constitutional questions.

Congress did not deal with ideal social objectives. It took a limited initial step in the field of social considerations and did that under the commerce clause to remove burdens on interstate commerce. There is a long gap between burdens on commerce arising from competition at substandard wages and diminution of purchasing power on the part of some millions of employees benefited by Sec. 6, and any burden on commerce, actual or imaginary, arising from highly paid employees working over 40 hours per week.

It is argued that the 40-hour week theory is not only desirable as a social objective but that it is desirable as a means of spreading employment, regardless of class or salary. Again, the objective here is not speculation as to the bases upon which Congress might have acted, but is strictly limited to a determination of the extent to which Congress did act.

It may be that penalty wages have a tendency to spread employment as well as raise pay. Both objectives could be accomplished and benefit the classes of employees who are aided and protected by Sec. 6. Congress could, and we think did, limit the coverage of Sec. 7 the same as it limited the coverage of Sec. 6.

The history of this legislation discloses some trace or color of suggestion that broad and sweeping provisions should be adopted by Congress. No doubt, these were considered but the final legislation represented many compromises. The Conference bill, together with the Committee reports and the debates, disclosed strict adherence to those views which, throughout the consideration of the subject, advocated limited action for specific and limited purposes.

The abandonment of a Board with broad legislative powers in favor of an Administrator with narrow administrative powers, is indicative of the intent to write a limited law which only required limited administration and a minimum of discretion.

Congress well knew of the various and varying industry problems with which a Board would have been required to deal in a discretionary way in fixing wages and hours if the law was to have broad application. The compromise made was to limit the law so as to require only minor administrative regulations. Our theory of this case is consistent with a limited law and limited administration. Respondent's theory of a broad law with narrow administrative procedure is inconsistent with the known economics of industry and the nation.

Congressional Intent

Congress had in mind helping the underprivileged, and at the time everybody thought so and said so. If Congress had in mind going beyond those limited objectives and to reach ideal social objectives, we would expect to find something in the record in support of the proposition. The repeated references to the underprivileged and the burdens on interstate commerce incident to the exploitation of the un-

der-privileged, and the total absence of anything in the legislative history indicating any other purpose, certainly should be persuasive of the intention of Congress.

Many references and quotations from the Congressional debates were made in Petitioner's brief and we will avoid general repetition here.

Certain additional excerpts from the Committee hearings and Committee reports are so strongly persuasive of the limited purpose of the bill that we quote them.

The hearings on S. 2475 and H. R. 7200 were conducted by a joint Committee. The legislative history of this law involved consideration of many problems and varying provisions of different bills. Some of these proposals contemplated regional differentials in wages and varying minimum wages. Some of the original provisions contemplated a Board with broad powers to fix wages and hours and to grant exemptions. The fact that the final bill does not give to the Administrator the power to determine exemptions regardless of the nature of the industry or the duties of the employee is persuasive of limitations in the classes of employees covered. Regardless of the variations in details, there was never any variation in the clearly stated objectives to deal only in a limited way with the matter of wages and hours and to extend the protection of the law only to those groups of employees who were regarded as underprivileged and defenseless.

Legislative History

On June 2-5, 1937, the Honorable Robert H. Jackson, appeared before the Committee, and his testimony is reported in Part I of the Committee hearings on S. 2475 and H. R. 7200. At page 30, Representative Wood referred to a situation where wages of from $3 to $4 per day had already been established by agreement in different cities. In reply, Mr Jackson said:

> "Your illustration is so far above the minimums which the Board is permitted to deal with that the situation would not be affected, because the purpose of

the minimum-wage bill is not to help the man who already has been able, by collective bargaining, to establish a fair wage."

Representative Dunn:

"I understood you to say awhile ago that the Board would establish different minimums in a given industry in different localities. Did you not say that?"

Mr. Jackson:

"That is right; but what I am pointing out to you is that your illustration will not be affected at all * * *. In other words, the dealing with the minimum wage does not deal with the people getting wages in the higher brackets."

Page 33. Senator Walsh:

"The trades that he speaks of, the well-paid craftsmen, would have no application. There is no question of wages at all unless the annual income to the worker is less than $1,200."

Mr. Jackson:

"That is right."

Representative Conley:

"That satisfies my question."

Page 38. Representative Connery:

"* * * Do you believe under this $1,200 provision, is it not the idea of the legislation to take care of the poorest paid workers in the United States, in fact, those whom labor has not been able to reach or to organize? A man getting $6 a week working 60 hours a week. Is not the idea of this legislation to bring them up to something like $16 a week, and then come up to the maximum of $1,200 a year, and then leave it to labor to build up from $1,200 on?"

Mr. Jackson:

> "That is the purpose, of course, to maintain the fair wage, to establish the floor above which labor may build."

Page 39. Mr. Jackson:

> "* * * The whole purpose of the bill is to elevate the floor, so to speak, below which wages must not go. Certainly there is no purpose here to nullify the effects of collective bargaining where that has resulted in a better than minimum fair wage for workmen."

Mr. Jackson stated the purposes and limitations of the law as understood by everybody that had anything to do with enactment of the law. The first Administrator, Mr. Andrews, understood and stated the purposes of the law when he addressed the Southern States Industrial Council at Birmingham, Ala., on September 29, 1938. During an open forum discussion following his speech, the former Wage-Hour Administrator was asked this question:

> "Many clerical and nonsupervisory employees are on a monthly or weekly-wage basis. It is necessary for such wages to be recalculated to an hourly-wage basis and time and one-half paid for hours over 44?"

The Administrator answered:

> "* * * Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, because *you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's work.*" (Reported in October 24, 1938, issue of the Labor Relations Reporter, and again referred to in 3 Wage and Hour Reporter 228.)

On June 7-15, 1937, Mr. John L. Lewis appeared before the joint committee and his testimony is reported in part II of the committee hearings. At page 281, Mr. Lewis strongly opposed giving the proposed board any authority whatever over any wage above the minimum prescribed and said:

> "Their power should be restricted to making those standards come up to the minimum standards declared necessary by Congress. * * * I think the power of the board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of Section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action."

At page 303, Mr. Lewis said:

> "I do not think it is well to build up a tariff atmosphere around this bill, because it is essentially an economic wage bill that has to do with increasing the living standards of people who now have subnormal compensation * * *."

One of the proposals provided:

> "Maximum Hours
>
> "No employee is to be deemed to be employed in violation of this section if he receives additional compensation for his overtime employment at the rate of one and one-half times the regular hourly rate at which he is employed, or times the rate applicable under or pursuant to the act, *whichever is higher*". (Cong. Rec. Vol. 83, p. 9252)

Mr. Lewis didn't want overtime for the employees making more than minimum wages, regulated by Congress. Congress heeded labor's objections to having its field invaded and revised Sec. 5, now renumbered Sec. 7, by striking out the words "whichever is higher". Had the language of original Section 5 been adopted, it would have been perfectly clear that the payment of overtime at penalty rates ran to every class of employee regardless of salary and

regardless of union agreements. Mr. Lewis objected to that. The Conferees adopted a provision requiring payment of one and one-half times "the regular rate at which he is employed".

The only possible purpose of changing the language of Section 5 was to limit its application to the regular rates to which an employee is entitled under Section 6. There are no other regular rates in existence. All other rates are highly irregular, depending upon sections of the country, classes of employment and the bargaining power of particular employers and employees. Congress could hardly have expected to cure an evil, if any, by making its requirements contingent upon irregular and inconsistent private contracts.

Labor objected to the invasion of its field in the higher brackets and a change was made in the bill. This change not only met the objections of labor but squared it with the purpose of limiting the legislation in its entirety to those poorly paid and helpless classes of employees.

At page 950, Mr. Sidney Hillman said:

> "Well, of course. I do not believe, as I understand it, that the purpose of the bill is to establish anything other than minima."

It is certainly clear that organized labor did not want Congress to invade the field covered by organized labor. Labor was willing to have a minimum wage floor fixed by Congress, but it wanted it clearly understood that the unions were to be free to organize employees, negotiate contracts and establish wages above the minimums. The establishment of overtime wage provisions has always been as much a part of the field of organized labor as the establishment of wages for straight time.

House Committee print of S. 2475, dated December 11, 1937, proposed to provide for overtime at penalty rates for night work only, and limited the overtime rate to one and one-half times the *statutory straight time* minimum rate:

"* * * That for the purpose of maintaining the health, efficiency, and general well-being of the employees affected, it is the declared policy of this Act to discourage employment of persons between the hours of midnight and 6 o'clock antemeridian in those industries or occupations which do not require continuous process operation, and persons employed in such industries or occupations between the hours of midnight and 6 o'clock antemeridian shall be paid a rate of not less than one and one-half times the rate established pursuant to subsection (b) of this section."

House Report No. 2182, 75th Congress, Third Session, April 21, 1938 (to accompany S. 2475). Page 6:

"The federal government cannot and should not attempt to regulate the wages of all wage earners throughout the United States."

Congress seems to have recognized some limitations on its power. If Congress did recognize a limitation on its power with respect to straight time minimum wages, certainly the same limitations would apply to overtime minimum wages. The limitations, if there be any, must relate to the effect on commerce. Congress might exercise its power to help the lowest classes because their conditions burden commerce and result in unfair competition in commerce, but similar results do not flow from either the wages or hours of the better paid employees. Congress did not think so, and to repeat, the observations of Mrs. Norton, "if it had, it would have said something about them."

House Report No. 1452, Union Calendar No. 535, 75th Congress, 1st Session, August 6, 1937. Page 9:

"It only attempts in a modest way to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked."

Page 15:

"Subsection (a) introduces flexibility in the regulation of hours by authorizing employment for more

hours per week than the applicable maximum upon condition that payment for such overtime is made at one and one-half times the regular rate."

Senate Report No. 884, 75th Cong., 1st Sess., July 6, 1937., Page 3:

"It is not intended that this law shall invade the right of employer and employee to fix *their own contracts of employment*, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage."

Page 8:

"And the policy is declared that orders relating to wages shall affect only those employees who need legislative protection and shall not interfere with the processes by which higher wages are secured."

Page 9:

"Section 18 provides for the payment of reparation to employees who have been paid lower wages or who have been employed for longer hours than the applicable standards allow. In the case of wages this reparation amounts to the difference between the wage received and that which should have been paid. In the case of hours, additional compensation is required for the overtime (where the act requires overtime) at the rate of one and one-half times the regular wage."

The foregoing references to committee hearings disclose the purposes of those who proposed Congressional action. The legislative road was long and tortuous and many proposals were considered. The final Conference agreement followed the idea of helping the needy only.

Conference Report No. 2738, 75th Congress, Third Session, June 11, 1938. At page 21, Mrs. Norton pointed out:

"Now the declared policy of Congress is to remove certain bad labor and industry conditions, and to do

that Congress put an absolute ceiling on statutory wages and a ceiling on what an industry committee could do. That ceiling was 40c. Certainly, there was no intention of tampering with anything higher than the statutory minimum, or the industry committee minimum. Congress did not find that those higher wage levels inflicted the bad conditions it struck out against in its declaration of policy. If it had, it would have said something about them."

Congress certainly would have been "tampering" with wages above the statutory minimums if Section 7 is to be construed as forcing the payment of penalty rates for overtime in connection with wages above the minimum and regardless of amount. If, as Mrs. Norton pointed out, there was nothing in the declaration of policy to indicate that higher wages resulted in bad conditions, it is equally true that there is nothing in the Congressional findings to indicate that it was necessary to impose penalty overtime wages without regard to classes of employees and without regard to their salary.

In the debates on the Conference bill, it was made clear that the Conferees dealt only with conditions relating to the law-wage group:

Mr. Welch, one of the Conferees:

"When you stop to consider the thousands upon thousands of unfortunate people, some of whom are being paid as low as $3 a week, working as long as 60 hours a week, there is great merit in this bill. There will be an immediate reduction from 60 to 44 hours and in two years thereafter, to 40 hours, and an immediate raise in hourly wage for those who are now receiving from $3 to $6 a week, to $11 a week."

Mr. Randolph, one of the Conferees:

"There are, of course, compromises in the Conference report on the final draft of the wage and hour bill which comes before us. They are reasonable and sensible compromises, but the principles remain the same. I ask you, as a plain matter of policy in this connection,

is it not best in this first federal bill, designed to bring up a little the wages at the bottom of the scale and regulate also the hours for the needy and underpaid workers of this country, to make certain concessions? Is it not better that we have exemptions, so that in future years, if found necessary and advisable, we can bring under this law other business or industry exempt in this first bill which establishes the principle of ending starvation wages and unfair competition? Certainly those who have had long experience as legislators in this body know that there must be some compromises made in bringing out a measure of this kind. We go into a new field.

"This bill properly enters the field of aiding and protecting those men and women in industry today who have no organization or collective bargaining agency to speak for them. The Congress of the United States on this occasion speaks for that group of individuals. So instead of being harsh your conferees have attempted to be sensible in this matter, and exemptions have been made and definitions have been placed in the bill which make it possible to bring a measure here which retains the best features of the House bill and good features of the Senate measure. And, after 10 or 11 days in a conference in which a very full and free discussion was undertaken, the gentleman from New Jersey (Mr. Hartley) joined in a unanimous report, and by his signature approved the work done. We come to you and say that, of course, this measure is not 100 percent perfect. Of course this bill does not involve all of the propositions many of us would like to have seen written into law; but certainly this measure is a well-balanced bill and takes into account the very ideas expressed by this body when the legislation was before us. I feel that it will take its place, along with the Social Security Act, as a great humanitarian effort. I trust; and I have reason to believe, that men and women on both sides of the aisle will join in almost unanimous approval of this fair, sensible, and trail-blazing conference report." (June 14, 1938, 83 Cong. Rec. 9258.)

Mr. Schneider, speaking on the Conference bill:

> "The American people are now aware of a situation where the helpless, unorganized, and submerged one-third of the population are being exploited mercilessly and ruthlessly. They are determined to put a stop, once and for all, to the human degradation caused by the payment of sweatshop and starvation wages, by the working of men and women for very long hours, and the employment of children in their tender years. The Congress now has a chance to speak out and adopt this proposed measure, which, despite any of its shortcomings, will go a long way to end the exploitation of the poorest paid, the hardest worked, and the most defenseless toilers." (June 14, 1938, 83 Cong. Rec. 9260.)

At page 9261, Mr. Schneider, continuing, said:

> "Mr. Speaker, the Secretary of Labor, Frances Perkins, in a radio address on May 17, 1938, declared that 'it is estimated that a minimum of 40 cents per hour would have affected 1,250,000 to 2,000,000 workers in the summer of 1937, including those in manufacturing, in wholesale trade, and other industries engaged in interstate commerce, except on railroads and interstate motor carriers.' She also stated that 'it is estimated that eventually the pending bill will shorten the hours of about 2,500,000 workers.' "

This statement is quite important because it shows that it was contemplated that the hours or overtime wage provisions would affect a number of employees not substantially different from the number covered by Section 6 minimum wages. Obviously, if the Secretary of Labor had viewed the legislation as affecting those classes of employees drawing wages in excess of the minimum prescribed by Section 6, then the numbers affected by Section 7 would have been many millions in excess of the estimate of the Secretary of Labor.

Mr. Fish, speaking on the Conference bill:

> "It strikes an effective blow against sweatshop hours, wages, and conditions that should have been

done long ago. It affects the welfare of millions of poor wage earners mostly unorganized, and who have little voice for themselves." (June 14, 1938, 83 Cong. Rec. 9262.)

Spreading Employment

The argument that penalty overtime wages were for the purpose of spreading employment for all classes is hardly tenable. In view of the fact that the Fair Labor Standards Act is in the form of permanent legislation, it can not be said that Congress contemplated a permanent unemployment problem with respect to all classes of employees. Congress might well have reasoned that something in the nature of a permanent employment problem might exist with respect to this large group of unskilled workers—they always have had an unemployment problem. Congress could well have reasoned that even if conditions arose which might temporarily relieve their employment problem, the minimum wages were so low that the payment of overtime based on the minimum would be beneficial to the employees and could not adversely affect the national interest. It would be quite a different thing to assume that Congress, in the initial step towards social legislation, should have inflicted on the country as a whole the inflationary principle of penalty overtime wage provisions affecting all classes of employees for all time, without regard for the effect or the relationship of such a provision to the objectives of the bill or to commerce generally.

The principal decisions of this Court dealing with the necessity for and importance of determining the intent of Congress were cited in the brief of Petitioner, Overnight Motor Transportation Company, Inc., and those arguments and citations need not be repeated here.

Precedents

The Administrator of the Fair Labor Standards Act filed with the Circuit Court of Appeals a brief as *Amicus Curiae* in this case, and presumably will do likewise here. In the

brief above referred to, reference is made to several federal statutes providing for the payment of overtime. The inference appears to be that as these statutes provided for the payment of overtime at rates based on amounts paid by the employer to the employee, such precedents are persuasive as to the intent of Congress under this Act.

An examination of the Acts cited by the Administrator discloses little, if any, similarity between those Acts and the Fair Labor Standards Act.

The *Public Printing Act*, January 12, 1895, Sec. 39, 28 Stat. 607, provided for the payment of overtime at a rate of 20 per cent in addition to the rate per hour. However, the rate per hour was fixed by the Public Printer pursuant to law. There did not exist the distinction between a statutory minimum and a rate actually being paid because there was only one hourly rate upon which overtime could possibly be computed. This Act was amended on March 4, 1904, 35 Stat. 1024, and the Public Printer was empowered to pay for overtime at a rate not exceeding 50 per cent in addition to the rate per hour; but still the one and only rate per hour was fixed by the Public Printer.

The *Customs Officers' and Employees' Act*, February 7, 1920, 41 Stat. 402, was cited by the Administrator, and that Act established the rate base as "the day's pay" and the overtime rate was one-half day's additional pay for each two hours of overtime at night and two additional day's pay for Sunday or holiday duty. But, here again, there was no choice between minimum wages and actual wages because there was only one wage, and that was fixed by law.

Reference was made to the *Act of March 4, 1917*, 39 Stat. 1192, providing for suspension of the 8-hour day on public works (27 Stat. 340) and work in excess of 8 hours was permitted with overtime rates "at not less than time and one-half". There was no choice here as between a statutory minimum and a contract rate. There was only one rate.

The *Walsh-Healey Public Contracts Act* of June 30, 1936, Sections 1 and 6, 49 Stat. 2036, 2038, provided for payment

of "prevailing minimum wage" rates to be determined by the Secretary of Labor, and then further provided for overtime and the payment for overtime at "not less than one and one-half times the basic hourly rate". Under this Act, there may have been a difference between the basic hourly rate established by the Secretary of Labor and the actual rate paid by the employer. We have found no case holding that where the Secretary had made a "prevailing minimum wage" finding that payment on that basis did not satisfy the law. In the administration of this law there does not appear to be the policy of penalizing employers in computing overtime on the basis of their voluntary payments to employees. The Wage and Hour Reporter, Volume 4, page 600, cites a ruling by the Public Contracts Administrator that excess payments to employees for work done on Saturdays and holidays does not have to be taken into consideration in determining the hourly rate upon which overtime must be paid under the Public Contracts Act.

While, as was pointed out in *Perkins* v. *Lukens Steel Company*, 310 U. S. 113, decided April 29, 1940, the conditions which the Government may attach to its business, concern the Government alone, it is interesting to note that the administration of this law recognizes the fact that no public purpose is to be served by forcing employers to pay penalty wages for overtime based on every conceivable formula.

The policy and findings section of the Fair Labor Standards Act (Sec. 2) discloses that unfair competition in commerce was one of the evils against which the Act was directed. This unfair competition arose in connection with goods produced on substandard labor conditions when in competition with goods produced under fair labor conditions. To put a ceiling on the increase in wages required of those operating under substandard conditions and impose no limitations with respect to those voluntarily paying wages in excess of the minimum would seem to create a disparity in labor costs as great or greater than that which

prevailed before the Act was passed. An employer who had paid only 20c an hour would, under the Act, be forced to raise the wage to 30c, and, if he did so, and no more, the ceiling under the overtime provisions would be 45c an hour, or a penalty of 15c an hour for the overtime worked. To take the employer who voluntarily paid 60c an hour and compel him to pay 90c an hour for overtime, would result in a penalty of 30c per hour for overtime, the 30c per hour penalty being 100 per cent greater than the penalty imposed on the employer who barely meets the requirements of the Act.

The bare fact that under the statute neither the high-wage nor the low-wage employer is required to work anyone overtime would not remove the crushing effect of the disparity in the overtime penalty rates. The statute was not enacted as an emergency or temporary measure. The shortage of labor in industrial communities may well compel a considerable amount of overtime for one manufacturer, whereas his competitor, located in a rural and non-industrial section, may not feel the effects of the labor shortage at all.

In addition to the foregoing, under the *National Industrial Recovery Administration Codes*, numerous provisions were made for minimum wages, maximum hours, and payments for overtime. Code No. 278, covering the Trucking Industry, was introduced February 26, 1935 in the hearings before the House Committee on Interstate and Foreign Commerce, in connection with H. R. 5262, 74th Congress, 1st Session, at page 193. Article V, Paragraphs 2 and 3 of that Code provided for the payment of overtime "at the rate of one and one-third (1-1/3) their normal rate". The provisions of this Code were diligently enforced not only by the Law Division of the N. I. R. A., but also by a special Compliance Division established by the industry. In no cases coming to our attention was it ever contended that aggregate payments amounting to the minimum straight time wage for the straight time hours, plus one and one-third times the straight time minimum wage for the over-

time hours did not fully comply with the requirements of the Code.

In the only two precedents that have come to our attention where there may possibly have been a choice between a statutory minimum and a higher contract wage; the first involving the Walsh-Healey Public Contracts Act, the overtime payments were not required to be pyramided on excess rates voluntarily paid by the employer; and the second, involving the Codes, appears to have been administered on the basis of the minimum wages prescribed by the Codes.

The Administrator has argued elsewhere, and presumably will do so here, that if Section 7 overtime was intended to be limited to wages covered by Section 6 minimum wages, there could have been no purpose in the provisions of Section 13 in exempting executive, administrative and professional employees because it is said that their compensation would, in practically all cases, exceed minimum wages. An analysis of the numerous exemptions contained in the Act clearly discloses that wages had nothing to do with any of the exemptions. The clearly established principle underlying the exemptions was the nature of the employment or the industry which made it impossible to punch a clock for the purpose of keeping time records, or, that the public service rendered by certain industries was paramount to the payment of overtime wages on a statutory basis.

It is further argued that if Section 7 overtime was intended to be limited to wages covered by Section 6 minimum wages, there could have been no purpose in the provisions of Section 7(b), Paragraphs (1) and (2), covering union agreements which limit employment to a fixed number of hours per year. The policy of Congress, as disclosed by Section 2(b), is "to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." The provisions of Section 7(b), Paragraphs (1) and (2) are, as a practical matter, more closely related to the classes of employees covered by Section 6 than any other classes because they have

a greater need for taking full advantage of employment when they can get it than any other classes. There are also many industries in which employment is not necessarily seasonable but are subject to many other limitations on continuous operations.

In the debates in the House immediately preceding passage of the Conference bill, Mrs. Norton, who was in charge of the bill in the House, explained the purpose of these exemptions as follows:

> "This exemption will take care of the peculiar situation which exists in isolated mining and lumber camps which are located, in some cases, 75 or 100 miles from civilization. We have also provided an exemption from the basic maximum hours for employers who have adopted the annual wage plan." (June 14, 1938, 83 Cong. Rec. 9257.)

Conclusion of Point I

As we view the matter, this question could only be debatable here by reason of the fact that the provisions of Section 7 were drafted in conference and were never subject to Committee hearings or discussion and a Conference bill is not subject to amendment on the floor.

The Conferees understood the purposes of the legislation and expressed their understanding in their report and probably didn't foresee that anyone would or could, through some strained process of literal construction, distort the plain intent of Congress.

In concluding the argument on this point, we point to the abundance of evidence of the intent of Congress to limit the scope of the legislation with respect to both wages and hours to the lowest paid and unorganized employees.

II

The Private Right of Contract is Not Destroyed by the Act, but is Merely Restricted by a Minimum Wage Floor Below Which Employer and Employee May Not Contract. Petitioner is Entitled to the Usual and Ordinary Presumption that the Parties Contemplated Compliance With the Law in Their Over-All Contract.

Respondent seeks a judicial reformation of his employment agreement to raise his *straight time pay far beyond the limits fixed in Sec. 6*, and then contends for an all-inclusive construction of Sec. 7, in order that he may recover an unexpected and unearned windfall.

Administrative Rulings

The position first taken by the Administrator of the Fair Labor Standards Act on Sept. 29, 1938, was that Congress had dealt with the subject in a limited way only and that there could be no question of violation of the law by the payment of weekly salaries in cases of this kind. That view displeased those who advocate broadening of the statute by construction beyond the intent of Congress, and on October 21, 1938, his Bulletin No. 4, Wage-Hour Manual, 1940 Edition, Page 95, appeared to reverse the prior position.

We make the qualifying statement that Interpretative Bulletin No. 4 *appeared* to revise the prior position. However, as late as April 14, 1941, we find that the instructions of the Assistant Solicitor of the Wage-Hour Division to the field staff of the Division are in substantial accord with the original position of the Administrator. The opinion involved determination of straight time and overtime compensation in cases involving fixed weekly salaries for both a regular number of hours and for an indefinite number of hours.

The Solicitor ruled:

> "'The question is one of fact. No rule can be laid down to be applied in all instances. The situation is

much the same as one which would arise in contract law if an employee brought suit to recover an amount in excess of the regular salary paid him, alleging that the salary was compensation for a specified number of hours and that he had on certain occasions worked in excess of that specified number. The court would then proceed to determine the facts, and if on all the facts it determined that the employee had not been fully paid, it would award him additional compensation on a basis which in legal terminology is known as *quantum meruit*; that is, the employee having been employed at a fixed rate of pay is entitled to compensation at that rate for all services rendered. For our purposes the distinction between so-called irregular and fluctuating or regular workweek is much the same. The test is, does the employer hire the employee at a salary for a certain number of hours and does he, therefore, owe the employee additional compensation on a prorata basis when that specified number of hours is exceeded; or can the employer successfully contend that the facts and circumstances of employment are such that the salary is the employee's regular compensation for all hours worked, no matter what the exact number of hours may be. * * * In summing up, we may state the rule as follows: Given an employee employed on a salary basis it is necessary to determine as a matter of fact how many hours of work per workweek the employer may exact from the employee in exchange for such salary. As we stated before, the answer to such question depends upon an examination and evalution of all of the pertinent facts and circumstances in a given case. We have to know when an employee works 60 hours and receives a salary of $30 in a given work week, whether or not that $30 is all the employer owes the employee as his regular compensation for a workweek of such length. A test such as the following may prove workable: Is the salaried employee hired to do a job rather than to work a schedule of hours? Does the job necessarily involve irregular or fluctuating hours per day or week? The questions taken together constitute a single test; one question is not complete in itself."

The foregoing opinion was given by an Assistant Solicitor to the field representatives of the Labor Department for

their guidance. The opinion was furnished to and published by the Wage and Hour Reporter. (4 W. H. R. 181)

It has always been contended that the clerk-dispatcher, Missel, was employed by the week to do a job and was not employed for any definite number of hours. The Assistant Solicitor says that the test as to whether there is any liability under the Fair Labor Standards Act, is whether there would be any liability in court for additional compensation under the employment contract. If what the Assistant Solicitor says can be relied on, that ought to dispose of this case, because certainly, no court in the land would award another dime of compensation under the employment contract.

It may be the duty of the Administrator to endeavor to establish the broadest possible coverage for the Act which he administers. This effort has led to many conflicting and confusing bulletins. This observation is made for the particular purpose of pointing out that interpretations expressed in "releases", "letters", "views", "inter-office correspondence", and "rulings", made by almost anyone on the Administrator's staff, and never finding their way into the Federal Register, should not be adopted as aids to construction without much caution.

Industry Facts

Certain facts in connection with the industry disclose the reasons for making wage agreements on a weekly or monthly basis. These facts go far toward conclusively demonstrating that those wage agreements which had prevailed in the industry since its beginning, were not made for the purpose of evading the Fair Labor Standards Act. The industry facts and the course of conduct which flowed from those facts certainly should go far toward avoidance of construction which would convert a lawful agreement into an unlawful one, and should go far toward disposing of the question as to whether, in the discretion of the courts, penalties should be inflicted.

In 1935, when Congress was considering the Motor Carrier Act, certain transportation statistics were presented at the committee hearings. These data were compiled largely from surveys made under the N. I. R. A. Codes. In part I of the hearings before the Senate Committee on Interstate Commerce, in connection with S. 1629, February 25th to March 6, 1935, at page 309, it is shown that of the 190,000 motor carriers registered under the Code, about 80 per cent of them operated only one vehicle, and that only 5 per cent operated 5 or more vehicles.

The 1941 figures compiled by the Interstate Commerce Commission show that of the 40,000 carriers fully regulated by the Commission, only about 1,200, or 3 per cent had a gross business of $100,000 or more per year. From an operating standpoint, there isn't much difference between the main terminal of a small carrier and the scattered branch terminals of a large carrier. In both cases the volume of business passing through a particular terminal is relatively small, and a terminal employee, regardless of what he is called, has many and varied duties and responsibilities, and, generally speaking, it is not possible to establish an around-the-clock staff on regular 6 or 8-hour daily shifts.

The requirements of shippers and the arrival and departure of trucks are necessarily very irregular, and these terminal employees use their own judgment and run the terminals in accordance with the nature of the business and the variations in the amount of business from time to time. They know when they must work, when they must be on duty, and they always have a degree of responsibility, and that is why they are paid by the week to do a job. It serves to illustrate how impracticable it would be to determine an hourly basis for compensation.

They are very much like the railroad agent at a way station on a branch line. He is there when the trains come in and he is there in between times only to the extent necessary to do the volume of work on hand.

Many of these terminal employees on truck lines could be compared with the railroad employee who has the job

of running a pump and keeping a tank full of water. He is employed to do a job. He is paid by the month. He is responsible for results. He doesn't punch a clock when he goes to work, nor when he leaves, and his responsibility is continuous. He may work all day and all night too, or he may have very little to do.

Theory must yield to the practical problems of industry and it cannot be imputed to Congress that it intended to disregard these considerations.

It is not contended that the problems of the industry necessarily determine whether an employee may or may not be protected by a statute, but the problems of an industry which require the payment of wages on a weekly basis for services involving indefinite hours, should not by strained construction be permitted to inflict ruinous penalties when those contracts and wage agreements as made can be and should be construed as complying with the law.

Congress knew there were many situations in transportation which did not lend themselves to clock punching and **that is why all railroad employees were exempted from the** penalty overtime wage provisions. Likewise, seamen and others were exempted.

Duties of Terminal Employees

Most motor carriers serve all intermediate points. These intermediate points may be compared with the railroad way stations. Usually, a railroad way station is served by only one railroad, but a motor carrier intermediate point may be, and generally is, served by more than one motor carrier. This competition operates to reduce the volume handled at a particular intermediate terminal point. There are comparatively few joint terminals—those are confined to the larger cities.

These intermediate terminals are open from a few hours per day to 24 hours per day, depending on the size of the town and the volume of business of a particular carrier and on the business practices of the patrons. The men who

are employed at these terminals are variously called "agents", "rate clerks", "dispatchers", "cashiers", or just "clerks". They represent a class of employees who perform various duties, which include, receiving orders from and notifying shippers; collecting for C. O. D. shipments; quoting rates and collecting freight charges; tracing shipments; soliciting business and settling loss and damage claims; keeping books; handling petty cash accounts; paying drivers and helpers; dispatching trucks; and investigating and reporting accidents.

As early as December 23, 1936, the Interstate Commerce Commission promulgated and published in the Federal Register many safety regulations governing the inspection and equipment of vehicles, the marking, handling, care, and disposition of explosives, poisons and corrosives. Both employers and employees were charged with the duty of observing and seeing that these regulations were observed. There are many regulations promulgated by the Secretary of Agriculture dealing with quarantines and many other regulations of the Secretary having to do with the handling and protection of meats and other foods. It is the duty of the terminal man to comply and to direct compliance with these numerous regulations.

The foregoing illustrations serve to show how impractical it would be to convert these men into clock-punchers, and why, in the course of a day or a week, their responsibility may, at times, involve long hours.

The Fair Labor Standards Act, Section 13(a), provides for the exemption of "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)." It would have been simple to have taken care of these problems by considering these men as administrative employees. But, if the Administrator has acted within the scope of his authority in determining who were administrative employees, he has closed the door to that avenue of escape. The Administrator has ruled that

if any employee's duties involve more than 20 per cent of non-exempt classes of work, the Act applies to the employee with respect to his full time (See 29 Code of Federal Regulations 541, *et seq.*).

We had supposed that ability and willingness to perform various duties was one of the essential characteristics of an executive or administrative employee rather than an arbitrary "delimitation" based on either percentages or salaries. And while our views have found support in the decisions of the courts which have had occasion to pass on the question (*Devoe* v. *Atlanta Paper Co.*, D. C., Ga., 40 F. Supp. 284; *Tune* v. *Roselawn Florists*, D. C., Tex., 9/24/41, 4 Wage Hour Rep. 596), we realize that the issue has not been formally raised in this case. It did not seem possible to present to the courts below every question involved in the case.

The conflicts which have arisen by reason of the refusal of employees on the staff of the Administrator to recognize bona fide labor agreements with A. F. of L. unions will be discussed in connection with penalties.

The Position of Labor Unions

Labor unions didn't ask Congress to fix a statutory penalty wage for overtime for all classes of employees. They didn't object with respect to the low-paid group because generally that group didn't belong to unions and they were very difficult to organize. The negotiation of wage agreements for those above the minimum wages and inclusion or exclusion of penalty overtime wages has always been a function of the unions. These agreements are generally negotiated with some regard for the economic and competitive conditions in each industry and with some knowledge of the facts. No such results can fairly be accomplished through legislative fiat, and it is not reasonable to assume that Congress undertook to do so.

All union agreements in the trucking industry call for wages in excess of minimum wages provided under Sec. 6.

Many of the agreements do not have any overtime penalty rate provisions, and others start the penalty rates after anywhere from 40 to 54 hours, depending upon the nature of the operations. Many of the agreements recognize the desirability and necessity of a minimum weekly income, as distinguished from minimum hourly rates. Under these contracts, the employer pays for a minimum number of hours regardless of whether he has work for the employees to do or not, and these agreements frequently call for a minimum number of hours considerably in excess of 40 hours.

The industry cannot survive in such a hostile atmosphere and in the face of such conflicting views with respect to its liabilities with the prospect of retroactive assessments with double penalties.

The railroad labor unions are largely responsible for the exemption of the railroads from the penalty overtime provisions. There are more motor carrier employees in unions affiliated with the A. F. of L. than there are railroad employees members of the railroad labor unions and no one has suggested that the American Federation of Labor unions were less diligent in promoting the interests of motor carrier employees than the railroad labor unions are in protecting their employees.

In connection with the consideration of this legislation by Congress, various provisions were proposed to recognize existing labor contracts differing in terms from the provisions of Sections 6 and 7, and such recognition was to run for the life of those contracts. The Conference bill totally disregarded existing labor contracts, and, if construed to embrace all classes of employees regardless of salary, it would have forced an immediate cancellation and re-negotiation of most of the agreements in effect throughout the United States. If such a result were contemplated, we would certainly expect to find something in the record to make it clear. The fact that there are no provisions in the law giving recognition to existing labor agreements for any period is strongly persuasive of the view that Congress

enacted a minimum wage law, which did not invade the field already occupied by the unions.

The practical problems involved in the operation of an industry are far better understood by the business agents of the unions than by the Administrator's staff. This problem is well illustrated by the case of dockmen or platform workers. These men load freight into trucks, take freight off of trucks, wheel freight along the platform from one truck to another, and between the trucks and the warehouses. To a large extent, these duties are interchangeable depending upon the volume of business and the size of the terminal. Ordinarily, they are all covered in one union agreement at one rate of pay. A large portion of the industry operates under such agreements with the union.

This industry has been confronted with conflicting "administrative rulings" issued by the Administrators; conflicts in opinion between the Administrators and the Interstate Commerce Commission with respect to which employees affected safety; and conflicts between the unions and the Administrators with respect to coverage under the Act.

The union agreements were generally based on consideration of the work usually done by a class of employees and dockmen who load and unload trucks are ordinarily covered under the same union contract and no distinction was made as to whether they load trucks one day and unload them the next day. However, the Wage-Hour Administrator sought to apply the law to these men individually and in accordance with particular jobs they might be doing on a particular day or particular week. These rulings conflicted with the findings of the Interstate Commerce Commission with respect to its jurisdiction over employees affecting safety and conflicted with the union contracts. The rulings of the Administrator fomented dissension and dissatisfaction among the employees and numerous suits were filed against members of the industry. It was not until about 10 United States District Courts ruled against the Administrator that he revised his Interpretative Bulletin

No. 9 (Fourth Revision, March, 1942, 5 W. H. R. 233) to give recognition, in part, to the jurisdiction of the Interstate Commerce Commission. For three long years, the industry was harassed by suits demanding reformation of contracts which involved union agreements and demanding overtime wages at penalty rates, together with 100 per cent additional as statutory penalties. In every case, it was urged on the courts that the administrative rulings by the Wage-Hour Administrator should be adopted by the courts.

Conclusion of Point II

Before the employer in this case can be found to have violated the Fair Labor Standards Act under any theory, it is necessary to force, by construction, a weekly wage far beyond the limitations of the Act with respect to straight time wages, because it is only by so doing that a deficit in the payment of overtime can be created.

There is another very important factor in connection with employer and employee relations which the interpretations of the Administrator completely overlook. Practically every guaranteed weekly or monthly wage involves much more than payment for hours actually worked. These guaranteed wages assure the employer of the availability of the employee's services. They are in the nature of payments for stand-by or demand services. These payments are made whether work is required or not. There is a valid consideration for these payments, but it is not consideration for work and should not be disregarded in any process of reformation of contract for the purpose of determining either straight time or overtime wages. In the weeks involving long hours, the payments may barely cover the wages; but in the other weeks involving short hours, the excess payments are substantial.

Tested by every reasonable approach, this wage agreement complied with the law, gave the employee the security of a regular income, and gave the employer the assurance of his availability for service.

One of the striking features of the interpretation of "regular rate", as applied by the Administrator in this case, is that such "regular" rate cannot possibly be determined until after the employment has been completed. In other words, the determination of the "regular rate at which he is employed" is an *ex post facto* process, and this process results in an inevitable deficit for overtime regardless of the amount of wages paid. The construction contended for by the Administrator presumes that the employer did not include overtime in the aggregate wage and that instead of contracting to comply with the law, he contracted on a basis that would inevitably make him liable for overtime wages at a penalty rate, and in an amount which could not be determined in advance. People don't usually contract that way and it is a strange distortion of ordinary business relations to assume that they did; all for no other purpose than to convert an agreement which complies with the law into one which must violate the law. We submit that it is a most irregular way of determining a regular rate of pay.

III

The Double Penalty Provisions of Sec. 16, and the Overtime Pay Provisions of Sec. 7 in the Nature of a Penalty, Are Discretionary With and Not Mandatory Upon the Courts in Cases of Good Faith Litigation, and a Ruling that They Are Mandatory Deprives Petitioner of the Protection of the "Due Process" Provisions of the Constitution.

The argument and citations made in brief of Petitioner, Overnight Motor Transportation Company, Inc., need not be repeated here. We confine our discussion of this point to one additional observation. Section 10(a) specifically provides for judicial review. Would it not be strange to have provision for judicial review specifically set forth in the Act and then, as the Circuit Court held, to deprive the court of discretion with respect to penalties?

Apart from the constitutional questions discussed in Petitioner's brief, reference to Sec. 10(b) discloses that where

bonds are required, the amount of the bond is specifically limited to the amount represented by the difference between the wages paid and the wages claimed under the Act. No provision is made for a bond to cover penalties under Sec. 16(a). Obviously, it was never for a moment supposed that there could be an imposition of penalties in connection with any good faith litigation.

IV

The Act Imposes a Legislative Function to be Performed by the Interstate Commerce Commission for the Purpose of Implementing the Scope of Sec. 7, and Prior Determination of Facts by the Commission is a Prerequisite, Under the Primary-Jurisdiction Rule, to Action by the Courts.

The argument and citations made in brief of Petitioner, Overnight Motor Transportation Company, Inc., need not be repeated here. We confine our discussion of this point to one additional observation. In Respondent's brief before this court in opposition to petition for certiorari, it was argued that it would not be reasonable to apply the rule of primary-jurisdiction in the Interstate Commerce Commission to Respondent and it was stated that to do so would be "a legal exemplification of 'a Mahomet's body' suspended between the Fair Labor Standards Act and the Interstate Commerce Act * * *."

This argument presupposes some inherent right in Respondent to immediate coverage irrespective of all other considerations. Most transportation employees don't have any coverage at all under Sec. 7. Other classes require an administrative determination by the Interstate Commerce Commission in order to implement the Fair Labor Standards Act. There is nothing novel in the suspension of a statute pending its implementation by administrative determination. The Railway Labor Acts (45 U. S. C. A. 151, *et seq*) do not apply to employees of "interurban lines" unless and until the Commission finds from time to time, and as the nature of their operations may change, that they

are operating as a part of the steam road system. There, as here, the facts must be determined before the laws have application to particular employees.

The same situation arises with respect to the question as to whether a particular employee is engaged in interstate or intrastate commerce. Those are determinations which cannot, in the nature of things, be made by statute, but require an examination of the facts as they may vary from time to time. No employee can have the right to complain because this process may inevitably result in a period of uncertainty. The existence of these questions was recognized by Congress and in the debate on the Conference bill Senator Pepper, one of the Conferees, said: "The Conferees made no declaration. They merely have agreed on a measure which is applicable to the situation when the facts are presented. We have not defined the scope of it; we have merely said this is the law, and the facts will then determine its application." 83 Cong. Rec., p. 9168.

CONCLUSION

The overtime wage provisions of Section 7 should be construed to be co-extensive with the straight time wage provisions of Section 6, and no more.

Congressional intent, as disclosed by the legislative history, shows that Congress was interested in only the lowest wage brackets. No one even suggested that well-paid employees were not able to protect their hours or that their hours burdened commerce.

The inconsistency of permanent, inflexible legislation is now being demonstrated in connection with the war program.

The sound foundation of social gains already established would be preserved for future building if prudently applied at this time, as distinguished from Utopian ideals which may have the quality of destruction because of impractical results.

If a different view be adopted, then the payment of weekly and monthly salaries in excess of minimum wages, fully satisfies the law.

Respectfully submitted,

J. NINIAN BEALL,
Attorney for
AMERICAN TRUCKING ASSOCIATIONS, INC.,
Amicus Curiae.

March 31, 1942.

APPENDIX

STATUTORY PROVISIONS.

The pertinent statutory provisions are as follows:

Fair Labor Standards Act, 29 U. S. C. A. 201, et seq.:

"Finding and Declaration of Policy

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

* * *

"Industry Committees

"Sec. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce."

* * *

"Minimum Wages

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour,

"(2) during the next six years from such date, not less than 30 cents an hour,

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the

Administrator issued under section 8, whichever is lower and

"(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

"(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

"Maximum Hours

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"Wage Orders

"Sec. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee

thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The Committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

"(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

"(1) competitive conditions as affected by transportation, living, and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex."

* * *

"Exemptions

"Sec. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retail-

ing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); * * *."

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."

* * *

"Penalties

"Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

* * * * * * *

Interstate Commerce Act, Part II, 49 U. S. C. A. 301, et seq.:

"General Duties and Powers of the Commission

"Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continu-

ous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

* * * *

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. * * * "

* * *

CHRONOLOGY

LEGISLATION, LITIGATION AND ADMINISTRATION

12-23-36	Interstate Commerce Commission prescribed safety regulations, Ex Parte MC-4, 1 M. C. C. 1.
5-24-37	Wage-Hour Bills introduced in Senate (S. 2475) and House (H. R. 7200).
6- -37	Joint Committee Hearings held.
7-31-37	S. 2475 passed the Senate and referred to House Committee.
8- 6-37	S. 2475 reported by House Committee (House Report 1452).
12-13-37	S. 2475 recommitted to House Committee.
4-21-38	S. 2475 reported by House Committee (House Report 2182).
5-24-38	S. 2475 passed by House.
6-14-38	S. 2475, as Conference Bill, submitted in House and Senate and passed.
9-29-38	Wage-Hour Administrator construes law (Birmingham Speech).
10-21-38	Wage-Hour Administrator issues Bulletin No. 4, apparently rescinding "Birmingham Ruling", 1940 Wage Hour Manual, p. 95.
5- 9-39	Interstate Commerce Commission denies jurisdiction over motor carrier employees except for safety, Ex Parte MC-28, 13 M. C. C. 481.
12- 4-39	District Court reverses decision of I. C. C. in Ex Parte MC-28, Amer. Trucking Assns., Inc. v. U. S., 31 F. Supp. 35.

5-27-40	Supreme Court reverses District Court and upholds I. C. C. order in Ex Parte MC-28, U. S. v. Amer. Trucking Assns., Inc., 310 U. S. 534.
10-14-40	Supreme Court denies rehearing in A. T. A. case, 311 U. S. 724.
10-19-40	Missel (Respondent) resigned from employ of Overnight Motor Transp. Co. (Petitioner).
10-29-40	Missel (Respondent) brought suit against Petitioner.
2-20-41	District Court overrules motion to dismiss, Missel v. Overnight Motor Transp. Co., 36 F. Supp. 980.
3- 4-41	I. C. C. determines what employees have duties affecting safety, Ex Parte MC-2 and MC-3, 28 M. C. C. 125.
7-28-41	District Court construes Act to have limited application, Missel v. Overnight Motor Transp. Co., 40 F. Supp. 174.
1- 5-42	Circuit Court of Appeals, 4th Circ., reverses District Court, Missel v. Overnight Motor Transp. Co., 5 W. H. R. 25.
2-16-42	Supreme Court grants certiorari, Overnight Motor Transportation Co. v. Missel, No. 939, 62 S. Ct. 641.

SUPREME COURT OF THE UNITED STATES,

No. 939.—October Term, 1941.

Overnight Motor Transportation Company, Inc., Petitioner, *vs.* William H. Missel. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[June 8, 1942.]

Mr. Justice Reed delivered the opinion of the Court.

This case involves the application of the overtime section of the Fair Labor Standards Act of 1938[1] to an employee working irregular hours for a fixed weekly wage.

Respondent, Missel, was an employee of the petitioner, Overnight Motor Transportation Company, a corporation engaged in interstate motor transportation as a common carrier. He acted as rate clerk and performed other incidental duties, none of which were connected with safety of operation. The work for which he was employed involved wide fluctuations in the time required to complete his duties. The employment of respondent began before the effective date of the Fair Labor Standards Act, October 24, 1938, and terminated October 19, 1940. Until November 1, 1938, his salary was $25.50 per week and thereafter $27.50. Time records are available for only a third of the critical period, and these show an average work week of 65 hours, with a maximum of 80 for each of two weeks in the first year of the Act's operation and a maximum of 75 hours in each of three weeks in the second year. Nothing above the weekly wage was paid, because these maximum workweeks, computed at the statutory minimum rates with time and

[1] "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063; 29 U. S. C. § 207.

a half for overtime for the years in question, would not require an addition to the weekly wage.

Respondent brought a statutory action to recover alleged unpaid overtime compensation in such sum as might be found due him, an additional equal amount as liquidated damages, and counsel fee.[2] The trial court, refusing to hear evidence on the precise amount claimed, decided in favor of the petitioner on the ground that an agreement for a fixed weekly wage for irregular hours satisfied the requirements of the Act. Under such circumstances the court was of the view that pay would be adequate which amounted to the required minimum for the regular hours and time and a half the minimum for overtime. 40 F. Supp. 174. The Circuit Court of Appeals reversed with directions to enter judgment for the plaintiff in accordance with its opinion, an order which we interpret as authorizing a hearing in the trial court as to the amounts due. 126 F. 2d 98. As the questions involved were important in the administration of the Fair Labor Standards Act, we granted certiorari. — U. S. —.

Petitioner renews here its contentions that the private right to contract for a fixed weekly wage with employees in commerce is restricted only by the requirement that the wages paid should comply with the minimum wage schedule of the Fair Labor Standards Act, section 6, with overtime pay at time and a half that minimum, that in any event the Act does not preclude lump sum salaries in excess of the minimum, and that a contrary interpretation of the statute would render it unconstitutional.

It is plain that the respondent as a transportation worker was engaged in commerce within the meaning of the Act,[3] and unless

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[2] "SEC. 16. . . .

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 52 Stat. 1069, 29 U. S. C. § 216.

[3] "SEC. 3. As used in this Act—

. . . . . .

(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 52 Stat. 1060, 29 U. S. C. § 203.

specifically exempted was entitled to whatever benefits the overtime provisions conferred.

While now conceding that *United States* v. *Darby*, 312 U. S. 100, settles the constitutional power of Congress to legislate against labor conditions detrimental to a minimum standard of living required for the general well-being of workers, petitioner argues that there is no power under the Constitution to regulate the hours or wages of workers whose pay, in every instance, at least equals the minimum and whose hours are not injurious to health. Freedom of contract between employer and employee, it is urged, is destroyed by such an interpretation.[4] But hours or wages not patently burdensome to health may yet be subject to regulation to achieve other purposes. We assume here the statutory objectives discussed later, i. e., that the act is aimed at hours as well as wages. The commerce power is plenary,[5] may deal with activities in connection with production for commerce[6] and as said in the *Darby* case, may extend "to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." P. 118. Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length workweeks, by offering opportunities for unfair competition through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work. Overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations. Substandard labor conditions were deemed by Congress to be "injurious to the commerce and to the states from and to which the commerce flows." *United States* v. *Darby*, 312 U. S. 100, 115. To protect that commerce from the consequences of production of goods under substandard conditions, it may choose means reasonably adapted to those ends, including regulation of intra-

[4] "It is Petitioner's contention that though the constitutionality is clearly settled as to the question of correcting 'sub-standard labor conditions', a construction of the Act which has no relationship whatsoever to 'sub-standard labor conditions' would nonetheless be unconstitutional, for the potentiality of such a construction is to destroy freedom of contract between employer and employee."

[5] Labor Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37.

[6] Santa Cruz Co. v. Labor Board, 303 U. S. 453, 464.

state activities, p. 121, by minimum wage and maximum hour requirements, p. 123. Compare *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 466. If overtime pay may have this effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power." *Norman* v *B. & O. R. Co.*, 294 U. S. 240, 306-311. If in the judgment of Congress time and a half for overtime has a substantial effect on these conditions it lies with Congress' power to use it to promote the employees' well-being.

Statutory Construction. The petitioner attacks the basic conceptions upon which the Circuit Court of Appeals determined that the compensation paid by the respondent violated section 7(a) of the act.[7] That court felt that "one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment by reducing hours of work." We agree that the purpose of the act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and a half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the act even though their hourly wages exceeded the statutory minimum. The provision of section 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning. "A fair day's pay for a fair day's work" was the objective stated in the Presidential message which initiated the legislation.[8] That message referred to a "general maximum working week", "longer hours on the payment of time and a half for overtime" and the evil of "overwork" as well as "underpay." The message of November 15, 1937, calling for the enactment of this type of legislation referred again to protection from excessive

[7] Note 1 *supra.*

[8] May 24, 1937, 81 Cong. Rec. 4983, 75th Cong., 1st Sess., Sen. Rep. No. 884 on S. 2475, July 6, 1937, p. 2.

hours.[9] Senate Report No. 884 just cited, page 4, the companion House Report[10] and the Conference report[11] all spoke of maximum hours as a separately desirable object. Indeed, the form of the act itself in setting up two sections of standards, Section 6 for wages and Section 7 for hours, emphasizes the duality of the Congressional purpose. The existence of such a purpose is no less certain because Congress chose to use a less drastic form of limitation than outright prohibition of overtime. We conclude that the act was designed to require payment for overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum.[12]

We now come to the determination of the meaning of the words "the regular rate at which he is employed." Since we have previously determined in this opinion, in the discussion of petitioner's objection to the application of the Act on the ground of unconstitutionality, that the scope of the commerce power is broad enough to support federal regulation of hours, we are concerned at this point only with the method of finding the regular rate under the contract with respondent. Congress might have sought its objective of clearing the channel of commerce of the obstacles of burdensome labor disputes by minimum wage legislation only. We have seen that it added overtime pay. The wages for minimum pay are expressed in terms of so much an hour. Sec. 6(a)(1)—"Not less than 25 cents an hour" with raises for succeeding years or by order of the Administrator under Sec. 8. Cf. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126. Neither the wage, the hour nor the overtime provisions of sections 6 and 7 on their passage spoke specifically of any other method of paying wages except by hourly rate.[13] But we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered

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[9] 82 Cong. Rec. 11, 75th Cong., 2d Sess.

[10] House Rep. 1452, 75th Cong., 1st Sess., pp. 14, 15.

[11] 83 Cong. Rec. 9246, 9254.

[12] Cf. Bumpus v. Continental Baking Co., 124 F. 2d 549, 551; Carleton Screw Products Co. v. Fleming, 126 F. 2d 537, 539; Tidewater Optical Co. v. Wittkamp, 179 Va. 545, 551, 19 S. E. 2d 897, 899; McMillan v. Wilson & Co., 2 N. W. 2d 838, 839 (Minn. Sup. Ct.); see United States v. Darby, 312 U. S. 100, 125.

[13] Sec. 3(m) defined wage to include board, lodging or other facility customarily furnished employees. The Joint Resolution of June 26, 1940, for work relief and relief for the fiscal year 1941, Sec. 3(f) deals with piece work in Puerto Rico or the Virgin Islands. 54 Stat. 611, 616.

by the act.[14] It is likewise abundantly clear from the words of section 7 that the unit of time under that section within which to distinguish regular from overtime is the week. "No employer shall . . . employ any of his employees . . . (1) for a workweek longer than forty-four hours . . ." Sec. 7(a)(1).[15]

No problem is presented in assimilating the computation of overtime for employees under contract for a fixed weekly wage for regular contract hours which are the actual hours worked,[16] to similar computations for employees on hourly rates. Where the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular rate of employment for the week in question. Apart from the Act if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour. This method of computation has been approved by each circuit court of appeals which has considered such problems. See *Warren Bradshaw Drilling Co.* v. *Hall*, 124 F. 2d 42, 44; *Bumpus* v. *Continental Baking Co.*, 124 F. 2d 549, 552, cf. *Carleton Screw Products Co.* v. *Fleming*, 126 F. 2d 537, 541. It is this quotient which is the "regular rate at which an employee is employed" under contracts of the types described and applied in this para-

[14] Any other interpretation would render almost useless the exemptions from the act of employees in "executive, administrative, professional or local retailing capacity, or in the capacity of outside salesmen." Sec. 13(a)(1). Such employees are rarely paid by the hour.

[15] The legislative history of the Fair Labor Standards Act is inconclusive as to the intended meaning of the words "the regular rate at which he is employed." The committee reports do not discuss them. The bill which came out of the Conference and was adopted changed "regular hourly rate" of previous bills (S. 2475, introduced May 24, 1937; H. R. 7200, introduced May 24, 1937; and S. 2475 in the Senate, April 20, Calendar Day May 25, 1938) to "regular rate." Conference Report, 83 Cong. Rec. 9247, 75th Cong., 3rd Sess. "Hourly" may have been omitted as not descriptive of piecework or salary payments.

[16] Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours.

graph for fixed weekly compensation for hours, certain or variable.[17]

Petitioner invokes the presumption that contracting parties contemplate compliance with law and contends that accordingly there is no warrant for construing the contract as paying the employee only his base pay or "regular rate," regardless of hours worked. It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law. This contract differs from the one in *Walling* v. *Belo*, decided today, where the contract specified an hourly rate and not less than time and a half for overtime, with a guaranty of a fixed weekly sum, and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum.

In the Circuit Court of Appeals[18] it was held that the liquidated damages provision, section 16(b) of the Act, 52 Stat. 1069, was mandatory on the courts, regardless of the good faith of the employer or the reasonableness of his attitude. Petitioner attacks this conclusion as a denial of due process because if the damage provision is mandatory, the employer is "without opportunity to test the issues before the courts," citing *Ex parte Young*, 209 U. S. 123, *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, and other similar cases. Petitioner points out that if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act.

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[17] This has been the Administrator's interpretation of the Act. Interpretative Bulletin No. 4 issued October 21, 1938, revised November, 1940. While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application. Cf. United States v. American Trucking Associations, 310 U. S. 534, 549; United States v. Darby, 312 U. S. 100, 118, n. 2; Graves v. Armstrong Creamery Co., 154 Kansas 365, 370, 118 P. 2d 613, 616. Even negative construction may be significant. Trade Comm'n v. Bunte Bros., 312 U. S. 349, 351, 352.

Regulations on records issued pursuant to section 11(a) have since September 15, 1941, referred to Interpretative Bulletin 4 for the method of computation. 6 Fed. Reg. 4695, n. 9.

[18] 126 F. 2d 98, 111, and cases cited which so construed the Act.

Section 13(b)(1)[19] exempts from section 7 employees for whom the Interstate Commerce Commission has power to establish maximum hours of service. This exemption was derived from the Motor Carrier Act of 1935, 49 Stat. 543, which authorized the Commission to regulate "maximum hours of service of employees." A definitive order leaving employees with the duties of respondent subject to the Fair Labor Standards Act was not passed by the Commission until March 4, 1941,[20] after respondent's employment ended. This conclusion, however, was foreshadowed by the ruling of the Commission, December 29, 1937[21] that it would limit regulations concerning maximum hours to employees whose functions affected the safety of operations. Other orders, bulletins and opinions pointing to the final conclusion intervened.[22] These various determinations now make it clear that respondent was subject at all times since the effective date of the Fair Labor Standards Act to its provisions. The Interstate Commerce Commission never had the power to regulate his hours.

Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute,[23] and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under sections 6(a) and 7(a) are compensation, not a penalty or punishment by the Government.[24] Cf. *Huntington* v. *Attrill*, 146 U. S. 657, 667, 668, 674, 681; *Cox* v. *Lykes*

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[19] "SEC. 13 . . . (b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . ." 52 Stat. 1068; 29 U. S. C. §213(b).

[20] Ex parte MC-2, 28 M. C. C. 125.

[21] Ex parte MC-2, 3 M. C. C. 665, 667.

[22] March 25, 1939, Interpretative Bulletin, Wage & Hour Division No. 9; May 9, 1939, Ex parte MC-28, 13 M. C. C. 481, 488; June 15, 1939, Ex parte MC-C-139, 16 M. C. C. 497; May 27, 1940, United States v. American Trucking Assns., 310 U. S. 534.

[23] Cf. Labor Board v. Electric Vacuum Cleaner Co., No. 588, this Term, slip opinion p. 9.

[24] The Government has collected the cases under the Act upon the point: "One line of cases holds that the 'double damages' do not constitute a penalty incurred under the laws of the United States within the meaning of Sections 24(9) and 256 of the Judicial Code (28 U. S. C. secs. 41(9) and 371). Robertson v. Argus Hosiery Mills, 121 F. (2d) 285, 286 (C. C. A. 6th), certiorari denied, No. 638, present term; Stewart v. Hickman, 36 F. Supp. 861 (W. D. Mo.); Kuligowski v. Hart, 4 Wage Hour Rept. 203 (N. D. Ohio); Wingate v. General Auto Parts Co., 40 F. Supp. 364 (W. D. Mo.); Barron v. F. H. E. Oil Co., 4 Wage Hour Rept. 551 (W. D. Tex.); Hart v. Gregory,

Brothers, 237 N. Y. 376, 143 N. E. 226. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Atchison, etc. Ry.* v. *Nichols*, 264 U. S. 348, 351; *James-Dickinson Co.* v. *Harry*, 273 U. S. 119. Nor can it be said that the exaction is violative of due process. It is not a threat of criminal proceedings or prohibitive fines, such as have been held beyond legislative power by the authorities cited by petitioner. Even double damages treated as penalties have been upheld as within constitutional power.[25]

Affirmed.

The CHIEF JUSTICE concurs in the result. MR. JUSTICE ROBERTS dissents.

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218 N. C. 184, 10 S. E. (2d) 644; Forsyth v. Central Foundry Co., 240 Ala. 277, 198 So. 706; Graves v. Armstrong Creamery Co., 154 Kans. 365, 118 P. (2d) 613; Emerson v. Mary Lincoln Candies, 173 Misc. 531, affirmed 261 App. Div. 879, affirmed, 287 N. Y. 33, 38 N. E. (2d) 234; Abroe v. Lindsay Bros. Co., 300 N. W. 456 (S. Ct. Minn.); Tapp v. Price-Bass Co., 147 S. W. (2d) 107 (S. Ct. Tenn.); Duke v. Helena-Glendale Ferry Co., 5 Wage Hour Rept. 206 (S. Ct. Ark.); Dennis v. Equitable Equipment Co., decided March 16, 1942 (Ct. App. La.); Adair v. Traco Division, 192 Ga. 59, 14 S. E. 2d 466. . . . The other line of cases holding Section 16(b) to be remedial rather than penal involves determination of the applicable statute of limitations. Collins v. Hancock, 4 Wage Hour Rept. 522 (D. La. Caddo Parish); Tucker v. Hitchcock, No. 370, S. D. Fla., Oct. 2, 1941; Klotz v. Ippolito, 40 F. Supp. 422 (S. D. Texas)."

[25] Cf. Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512; Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U. S. 26; Kansas City Southern Ry. Co. v. Anderson, 233 U. S. 325.

A true copy.

Test:

Clerk, Supreme Court, U. S.